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Massachusetts Law Quarterly

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MIDWINTER MEETING
SPRINGFIELD, FEBRUARY 5-6, 1954

Notice with the complete program will be sent to all members in January. This issue of the "Quarterly" contains discussion of matters likely to arise in any lawyer's practice. Opportunity for brief discussion and questions in regard to them will be provided. Please send in promptly any other subject that you would like to have discussed so that, if practicable, it may be considered by the Committee.

GENERAL COMMITTEE

JOHN H. MADDEN, JR., Springfield, *Chairman*
DANIEL E. BURBANK, JR., Longmeadow
GERALD J. CALLAHAN, Longmeadow
IRVING M. COHEN, Springfield

COMMITTEE ON DISCUSSION PROGRAM

EDWARD B. LANDIS, Springfield, *Chairman*
JOHN T. QUIRK, JR., Springfield
ROBERT B. DUDLEY, Springfield

THE JUNIOR BAR SECTION

There will be a meeting of the Section probably on Saturday, February 6th. Details will appear in the notice of the meeting.

COMMITTEE ON MENTAL HEALTH AND ASSOCIATED PROBLEMS

The Committee, which will begin functioning immediately, is made up of the following members: Chairman, Walter Powers, Jr., Boston; George N. Welch, Chief Attorney, Veterans Administration, Boston; Efrem A. Gordon, Springfield; Dr. Oscar Raeder, Boston, Chairman, Massachusetts Psychiatric Association Committee on Legislation; Dr. Arthur M. Berk, psychiatrist, Brookline, and Dr. C. Stanley Raymond, psychiatrist, Wrentham State School, representing the Massachusetts Medical Association.

A MESSAGE FROM THE MEMBERSHIP COMMITTEE

To all members paid up but who received invitations to join the Association

We very much regret the error that occurred when you were mailed an invitation to join the Massachusetts Bar Association. Periodically the Association attempts to increase its membership by mailing invitations to non-members of the Association. The names and addresses of the non-members are determined by checking our membership list against the listings in the Massachusetts Lawyers Diary. This task as you can imagine is monumental and apparently some errors are unavoidable due to duplicate listings and other factors beyond our control.

Please accept our apologies for the inconvenience the error has caused you and our best wishes for a successful New Year.

FREDERICK G. FISHER, JR.
Chairman, Membership Committee.

MESSAGE FROM THE PRESIDENT

The problem of congestion in the Superior Court has been with the bar for many years. So also has been the criticism of the District Courts, whether or not deserved so far as certain particular courts are concerned. The Judicial Council has made various recommendations for reform in an effort to relieve the Superior Court delays, some of which have been enacted into law. Last year legislation was introduced, which passed the Senate and sought to reorganize the District Courts and put more of the Justices on a full time basis. The bill did not pass the House and the entire matter was referred to a Special Recess Commission. The Commission will report after the Legislature convenes. Meanwhile the group which introduced last year's legislation has filed Senate bill 322. The Judicial Council again is recommending specific measures to relieve congestion and the Executive Committee of your Association has approved such recommendations and added certain further proposals of its own.

I urge every member of the Association to study carefully the report of the Judicial Council, the action of your Executive Committee, and the forthcoming report of the Special Recess Commission. The Board of Delegates will meet in January to consider what action it will take in the name of the Association by way of approval or disapproval of these proposals. You have the right, as individuals, to stand back of this action of the Board of Delegates, or to oppose it. If the Board should give its approval to such of the various measures as appear to it to be improvements in the Superior and District Courts, your support will be vital.

Consider the proposals in the light of their effect upon the public interest and not just upon yourself as an attorney. If there is anything wrong with the courts, whether it be in manner of trials, the giving of justice, delay in hearings or in any other particular, it is a challenge to the bar to propose a remedy, and to urge that remedy upon the legislature so that the public, from whom come our clients, may be served.

If other bar associations, individual lawyers and civic organizations in different parts of the commonwealth will study these proposals with the reasons underlying them and will cooperate in their support, I have confidence that considerable progress may be made during the coming legislative session in meeting problems of practice and procedure which have been facing the profession for more than twenty-five years.

ROBERT W. BODFISH.

A REMINDER OF THE LEGACY OF JOHN DOE AND RICHARD ROE

In connection with the Contents of this issue of the "Quarterly" we respectfully call attention to the document above mentioned which was printed at the bottom of page 129 of the "Quarterly" for August 1953.

F. W. G.

CONGESTION IN THE SUPERIOR COURT

In connection with the statement of President Bodfish that "the problem of congestion has been with the bar for many years" attention is called to the legislative consciousness of that fact as reflected in Chapter 27 of the Resolves of 1925, quoted in the Judicial Council's report, in this issue, to which the President refers, as follows:

RESOLVES CHAPTER 27 OF 1925

> "Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and among other things . . . ways and means for encouraging, so far as consistent with constitutional rights, trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925.)"

The Council points out that the subject has been extensively studied for years and repeats its previously expressed opinion that

"The biggest fact that stands out from the figures is that congestion will never be cured if large classes of cases are to remain in the courts, as we believe they should remain *until the congestion is attacked at its source*" and that suggestions have been made "for this purpose in the past twenty years or earlier, but most of them have been opposed by lawyers."

During the past year or two there has been renewed and nation wide agitation about congestion. A committee of the Massachusetts Bar Association with Vice-president Schneider as chairman was appointed earlier in this year to consider the subject and following a report of that committee and further discussion of various suggestions, the Executive Committee voted to support the recommendations of the Judicial Council in its 28th report renewed in its current 29th report (in this issue) as follows:

1. For a fee of $15.00 for reasons stated in the report pp. 6-8.
2. For re-enactment of of Chapter 387 of the Acts of 1904 for reason on p. 9.
3. For oral depositions of *parties* (only) before trial for reasons on p. 10.
4. To place actions of contract and torts generally in the same jurisdictional class with motor torts in the District Courts for reasons on p. 5, relative to venue.

In addition to these proposals the Executive Committee voted to sponsor a bill (Senate 298) filed by Mr. Schneider on a petition for legislation

"to relieve congestion in the Superior Court by providing for the voluntary transfer from regular active service to more limited service of certain justices thus retaining their services in the administration of justice while also creating vacancies on the court to be filled by the appointment of new justices.

"This petition and accompanying bill were sponsored by the Executive Committee of the Massachusetts Bar Association by vote of that committee at a meeting on November 17, 1953."

SENATE 298

An Act to provide for the voluntary transfer of certain justices of the Superior Court from regular active service to more limited service and for the appointment of new justices to fill vacancies thus created.

Chapter 212 of the General Laws is hereby amended by striking out Section 1 and inserting in its place the following sections 1A, 1B and 1C.

Section 1A. The Superior Court shall consist of one Chief Justice, thirty-one associate justices, and such other associate justices as shall have been transferred from regular active service to more limited service as provided in the following Section 1B.

Section 1B. An associate justice of the Superior Court while retaining his office, may on his application under the terms of this act, be transferred by the Governor and Council from regular active service to more limited service, after attaining the age of seventy years and after serving, at least, ten years continuously, and after such transfer the justice shall receive an annual salary while still retaining his office of three quarters of the salary of an associate justice on regular active service as fixed by law at the time of such transfer to more limited service. As associate justice who has thus been transferred may thereafter be assigned by the Chief Justice of the Superior Court for service as an associate justice if he is able and willing provided that he shall not without his consent be assigned to serve more than three quarters of the time during which regular sessions of the Superior Court are held nor to serve in any county seat more than twenty miles from his domicile. No justice thus transferred upon regular active service whether called to active service or not shall engage directly or indirectly in the practice of law.

Section 1C. Upon each transfer of an associate justice from regular active service as above provided, a new associate justice shall be appointed.

EXPLANATORY NOTE TO SENATE BILL 298

The bill retains the partial service of the transferred judges while also creating vacancies in case of transfers to be filled as usual.

It is based on the act of Congress providing that a Federal judge "may retain his office, but retire from regular active service". See U. S. Code Title 28, Chapter 17, Section 371 as amended in 1951. This act works. See *Booth* v. *U. S.* 291, U. S. 339 and *U. S.* v. *Moore*, 101 Fed. 2nd 56. In the advisory opinion, 271 Mass. at pp. 577-8 the justices said, that an optional system "originating in a request—from the judge would not contravene any provision of the constitution."

6. The Executive Committee also sponsored a bill (Senate 299) also introduced by Mr. Schneider to permit the Chief Justice of the Superior Court to call up district court judges to sit with juries in motor vehicle tort cases as they may now be called to hear misdemeanor cases on the criminal side of the court.

7. Pre-Trial Hearings. The committee on congestion also recommended that it be authorized to take up with appropriate committee of the Superior Court the following suggestions *as a basis for discussion* and it was authorized to do so by the Executive Committee.

Suggestions for Discussion as to Pre-Trial Hearings:

1. One year after a case is entered in the Superior Court, if a trial by jury has been claimed, there shall be a pre-trial hearing. Each side shall be represented at the hearing by the attorney who is to try the case. Attendance at such a pre-trial hearing shall constitute a court engagement.

NOTE: *By a year from the date of entry, pleadings and interrogatories are completed and an end result reached in most cases. The cases are then ripe for settlement or adjudication.*

2. To this pre-trial hearing both attorneys shall come with complete data—hospital records, doctor's reports, bills, estimates, letters from employers or records concerning time lost and loss of pay or earnings, photographs, contracts, deeds, leases and all other pertinent documents. Preferably a full hour, and at least a half hour, shall be reserved for each case. There shall be a full discussion of liability and damages. The insurance policy shall be exhibited. Each side shall state a figure and the judge shall make a recommendation. Every effort shall be made to settle the case at that time. The effort may include adjournments and a renewal of the conference at a later date.

NOTE: *It is expected that many cases will be settled at the pre-trial hearing. Such a hearing will get the lawyers together to talk about the case. The opposing trial attorneys, with the help of the judge acting upon a full disclosure of the evidence should be able to agree upon an evaluation in a large percentage of the cases.*

3. If the pre-trial hearings fail to effect a settlement, agreement shall be reached on facts and issues and the admissibility of documents and photographs wherever possible.

NOTE: *Even when there is no settlement, the time spent by the judge at the pre-trial hearings will save far more trial time of a judge and a jury or a trial judge by eliminating the necessity of proving matters upon which agreement can be reached.*

4. In counties where continuous sessions are not held, the court may appoint referees to preside over pretrials between sessions and file reports for the use of the court.

NOTE: *See G. L. Chap. 221 sec. 55; G. L. Chap. 213 sec. 3 2d; Superior Court Rule 86; Superior Court Rule 87.*

This will leave the judges in those counties free to devote all their limited time to trials and yet give them the benefit of the reports of the referees.

5. If the pretrial efforts fail to effect a settlement, counsel shall be given the choice of a trial without a jury before any one of the judges sitting in Civil Sessions in the county that month or the following month. Thus, every judge will be an "A" Session judge to hear a case without a jury if the parties agree upon him. If counsel agrees to try the case without jury before a certain judge, the case shall be assigned for trial before that judge on a day certain and shall be the first case out before that judge on that day, to be tried as soon as the case then on trial before him, if any, is finished even though other cases have been sent into the session.

NOTE: *Rarely will a case be assigned less than three or four days ahead of the trial date, so other lawyers going into the session can ascertain the situation in the session ahead of time and will not need to have witnesses hanging around. The prospect of a quick trial on a day certain before a judge of his own choosing is a strong inducement to waive a jury claim.*

6. Cases which are not settled and in which the jury claims are not waived, and in which the extent of the damages in the opinion

of the pretrial judge is $1500 or more, shall be assigned by the pretrial judge for trial in the near future.

NOTE: *These are the cases of substantial injury where delay is causing hardship.*

7. Cases which are not settled and in which the jury claims are not waived and in which the extent of the damages is less than $1500 shall be sifted by the pretrial judge as follows:

(a) If the plaintiff has refused to cooperate in a settlement or in agreement upon facts or in the selection of a judge to hear the case without a jury, the case will wait six months for a second pretrial, unless during that six months both counsel agree upon and ask the court for an assignment before a particular judge without a jury.

NOTE: *There may be some judge sitting during the second, third, fourth, fifth or sixth month following the pretrial upon whom counsel can agree and they should have the opportunity to do so.*

(b) If the defendant has refused to cooperate in a settlement or agreement on facts or the selection of a judge to hear the case without the jury, the pretrial judge shall order the case placed upon a jury list for trial in the near future.

NOTE: *In those courts where the pretrial has been held before a referee, the judge can act on the referee's report in determining the order in which cases are to be heard.*

8. A similar pretrial shall be held every subsequent six months.

THE VANISHING LITIGANT

*From American Bar Association Journal (July 1953, 572)**

"Here, in America, we are so accustomed to reading of increases in population and expansion in our cities, factories and public utilities that we take it for granted that growth is the order of the day. It never enters our minds that recession rather than growth may actually be manifesting itself in an important phase of our American life. Least of all, do we, the members of the legal profession, expect tidings that a wizening process is going on in an activity which has always been the outstanding feature of the practice of the law.

"Those who have surmised that all activities in America are expanding and who have encountered recent issue of the *Fordham Law Revue* and the *Oregon Law Review*, which show that for more than a quarter century litigation has been declining in volume, must have been dismayed. Both articles, through review of court records, show that the volume of appeals is materially less today than it was thirty

years ago. One of the articles, by resort to data which are segregated into the categories of law, equity, crime and divorce, shows that since the biennium, 1927-1928, there have not been filed in the *nisi prius* courts of Oregon as many law, equity and criminal cases as were filed into that biennium. In fact, the article shows that although since 1927-1928 the state has added 600,000 to its population—600,000 potential litigants—the figures for 1927-1928 remain the high-water mark.

"Clearly, the litigant's interest in our courts is waning. In fact, he appears to be vanishing.

"It is by no means inevitable that adjudication of controversies by adversary action before a tribunal over which a judge presides is here to stay. Today we think it atypic that our forebears tolerated barbarous methods. Possibly future generations may be appalled by what we tolerate. Less than six months ago a group of insurance companies published in New York newspapers an advertisement which is significant. It said: 'Personal injury cases today are subject to a delay of three or more years before coming to trial in New York City' and offered all claimants against the companies' prompt arbitration. That advertisement shows that toleration is reaching its end and may afford an explanation for the waning volume of litigation. Even we cannot justify, but, to the contrary, condemn, the heart-rending delay which a seeker of justice must endure in many jurisdictions. Likewise, we are perturbed when we observe with increasing frequency trials that grind on in our *nisi prius* courts for six months and even longer. And who can say that posterity will not be astonished when it reads that some judges of our time held cases under advisement for three years and even more?

"Very likely the litigant is not vanishing. Manifestly, people get involved in controversies as frequently as ever before. Is it not possible that the would-be litigant has found a forum in which he can get a decision more promptly at less expense and with greater certainty than in the courts? It may be that it is the present method of judicial trial, or at least its employment in some categories of controversy, which is beginning to vanish."

A PENDING BILL TO MODIFY AND CLARIFY THE RULE AGAINST PERPETUITIES

FILED BY GUY NEWHALL

Editorial Foreword

There was an old story current about 1900, that a leading member of the bar and family adviser of the 19th century was discovered by a friend in the Law Library on a sweltering July day. On being asked why he was there, he said, "I have just discovered that I have put perpetuities in many of the wills that I have drawn in the last twenty years and I am trying to learn some law".

Every experienced practitioner probably shares the uneasiness suggested by the story when he drafts a trust instrument testamentary or inter vivos for a client. The Rule was the subject of a panel discussion in the American Bar Association Section on Real Property, Probate and Trust Law in August. Attention was called to the discussion by Prof. W. Barton Leach in the Harvard Law Review* and to the remarks of Lord Blanesburgh in 1924 in a case in England (where the rule was born in 1680) in which he felt bound by the cases to hold a gift invalid. He said:

> "In its application to the present case, the rule (against perpetuities) has been really a snare, useless so far as its legitimate purpose is concerned, but operative to produce an intestacy under which certainly one person would greatly benefit whose interests it was the permissible and express purpose of the testator by his codicil to circumscribe and reduce. In my own experience nearly all modern manifestations of the rule are of this character, and have this result. . . . The existence of the rule in these days is usually made manifest only in cases where, nothing of the kind having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. All the same, in these cases, the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate, in many directions—in this notably, that it brings a sound principle into entirely gratuitous discredit." Ward v. Van der Loeff (1924) A. C. 653.

In his article above referred to Prof. Leach after quoting this passage reminds us that:

> "A heavy corporate responsibility rests upon the legal profession office lawyers engaged in estate practice, trial lawyers, lawyers on the bench, and lawyers in the legislatures—to provide the public with a sensible, workable body of law relating to the devolution of property. As a practical matter the public must entrust to us the leading role in the preparation of wills and trusts and in the resolution of disputes concerning these instruments. As judges and legislators we make the rules; as estate planners and draftsmen we seek to conform to them; and as trial lawyers and judges we apply them. If there should be among our rules one which is so abstruse that it is misunderstood by a substantial percentage of those who advise the public, so unrealistic that its 'conclusive presumptions' are laughable nonsense to any sane man, so capricious that it strikes down in the name of public order gifts which offer no offense except that they are couched in the wrong words, so misapplied that it sometimes directly defeats the end it was designed to further

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* Vol. 60 No. 5, March 1952, pp. 721-748. A companion article appeared in England in "The Law Quarterly Review" for January 1952.

—then in performance of our corporate responsibility we should take corrective action. It will not do for us to say, 'The law has been violated. The gift must fail. The testator (sic) must take the consequences'—and then leave it at that. 'The law' did not make itself. We made it. If it has been made badly, or so intricately that it is a dangerous instrumentality in the hands of most members of our profession, our corporate responsibility to the public is not being met.

"By a natural sequence of thought this leads us to the Rule against Perpetuities."

At the panel discussion referred to the question was asked:

How many among us in all our composite professional experience have ever seen a will or trust in which the man who was disposing of his wealth really meant to violate the Rule against Perpetuities? Another way of putting this question is: How many among us has ever seen a will or trust which could not, with very minor modifications, have been brought within the scope of the Rule against Perpetuities by competent work on the part of the man who drew the instrument?

Following this discussion the subject was called to the attention of the President. In order that the bar committees and Massachusetts lawyers generally should have before them specific proposals prepared by those most familiar with the subject, we turned to Mr. Newhall as one of the practitioners best qualified both by knowledge and experience. With the assistance of Prof. Leach and Prof. Casner, Newhall prepared and with Senator Hogan, introduced a bill. This bill, with explanatory notes to each section is printed below so that it may be studied by the Massachusetts Bar Association Committees and others and, if found deserving of support (as we believe it to be) supported before the legislature.

Questions and suggestions will be welcomed.

F. W. G.

Senate Bill No. 361

Modifying and Clarifying the Rule Against Perpetuities

(Introduced into the Massachusetts Legislature on December 3, 1953 by Senator Charles V. Hogan and Mr. Guy Newhall of the Massachusetts Bar.)

Section 1. In applying the Rule against Perpetuities to an interest in real or personal property limited to take effect after one or more valid life estates, facts existing at the termination of such life estate or estates shall be considered in determining the validity of the interest.

Section 2. If an interest in real or personal property would violate the Rule against Perpetuities because the age contingency to which it is subject exceeds twenty-one, the age contingency shall be reduced to twenty-one.

Section 3. A legal fee simple determinable in land or a legal fee

simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not happen within thirty years from the creation of the interest. If the contingency happens within said thirty years the succeeding interest, which may be an executory interest, shall become possessory or the right of entry exercisable notwithstanding the Rule against Perpetuities.

Section 4. Except as provided in Section 3, this Act shall not be construed to render invalid any interest which would have been valid prior to its enactment.

Section 5. This Act, except so far as it is declaratory of existing law, shall apply only to deeds and inter vivos trusts executed and delivered after the Act becomes operative and to wills where the testator or testatrix dies after the Act becomes operative, including the exercise of a power of appointment after the Act becomes operative, although the power was created before.

Note: The above text of the statute includes slight verbal modifications of the Bill as filed; these will be offered as amendments.

NOTES TO ACCOMPANY PROPOSED MASSACHUSETTS STATUTE CLARIFYING AND MODIFYING THE RULE AGAINST PERPETUITIES

(PREPARED BY W. BARTON LEACH)

This statute aims to eliminate certain anomalies that have crept into the application of the Rule against Perpetuities in the nearly three centuries of its existence.

The Rule against Perpetuities declares that an interest is void unless it must vest, if at all, within 21 years after a life or lives in being at the creation of the interest. Under present law:

(*a*) The Rule is applied on the basis of births and deaths that might have happened, ignoring those that actually did happen. In the case of remainders after life estates (which constitute the great bulk of perpetuities cases) this means that facts existing at the death of the life tenants must be ignored, except in certain special cases. Validity depends on facts that might have happened as viewed from the death of the testator or creation of the trust.

(*b*) If the Rule is violated to any trifling extent the whole estate fails, rather than being cut down to permissible limits. A common case is a remainder to unborn persons with an age contingency in excess of 21. Usually the gift could be saved if the age were reduced to 21; but the present law does not permit this.

(*c*) The Rule does not apply to rights of entry upon a fee or to possibilities or reverter after a determinable fee, interests which may render land unmarketable for centuries.

All of the foregoing are considered anomalies to a Rule basically sound. It is to be noted that the proposed statute makes no change

in the basic Rule, but seeks to eliminate these anomalies in the types of cases that most frequently arise.

COMMENT ON SECTION 1.

CAUSING THE VALIDITY OF REMAINDERS TO BE DETERMINED IN THE LIGHT OF EVENTS THAT ACTUALLY HAPPEN, NOT EVENTS THAT MIGHT HAVE HAPPENED

A much-criticized early English case (*Jee v. Audley*, 1787) held that if at the time of testator's death there was any chance, however small, that events such as births and deaths might occur in such a way as to tie up the property for longer than the period of perpetuities, then the gift in the will was void. The court was forbidden to consider facts existing at the termination of previous valid estates; it must ignore these and consider, not what happened, but what might have happened as viewed from the testator's death.

Example: T bequeaths a fund in trust to pay the income to A for life and then to pay the principal to such children of A as shall reach the age of 25. At A's death all of his children have already reached 25, and all of them were lives in being at T's death. Nevertheless the whole gift to children fails since another child *might* have been born and *might* have been less than four years old at A's death (thus creating the possibility that such child would reach 25 more than 21 years after A's death).

It is obvious that, in the example, the fund cannot be distributed until A's death anyway. And it is standard practice for courts to refuse to pass upon the validity of the remainder until A has died. *B. M. C. Durfee Trust Co. v. Taylor*, 325 *Mass* 201, 89 *N. E. 2d* 777 (1950). Therefore there is no substantial reason of policy why the court should be compelled to close its eyes to facts existing at A's death and to strike down a gift which, in fact, does not tie up property for longer than the permissible period.

In the *Example*, if Section 1 of the prosoed statute becomes law, the court determines validity under the Rule by examining the actual facts as they appear at A's death. Thus the Rule is complied with if at that time:

(*a*) all of A's children are born before the death of T, or

(*b*) all children are at least 4 years old.

Section 1 would not save the gift if any child born after the death of T is less than 4 years old[1]. (But, as later appears, Section 2 would save the gift.)

To correct this situation the Pennsylvania legislature passed the Estates Act of 1947, which provides that the period of the Rule against Perpetuities shall be "measured by actual rather than pos-

[1] A child en ventre sa mere at T's death and later delivered is "born" at T's death according to long-established doctrine.

sible events." *Pa. Stat. Ann.* (*Purdon*, 1947), *tit.* 20, §301.4. In 1953 the Supreme Court of New Hampshire ruled, without aid of statute, that interests limited after life estates would be deemed valid or invalid on the basis of the facts existing at the death of the life tenants. *Merchants National Bank v. Curtis*, 97 *A.* 2nd 207 (1953).

Section 1 of the Proposed Statute accomplishes by legislation the result achieved judicially in New Hampshire. It is probable that the Pennsylvania statute is broader; but it seems certain that it will lead to litigation. A very large majority of perpetuities cases deal with interests that follow life estates; the draftsmen of the proposed Section 1 felt it desirable to have a very simple, clear statute that disposes of those cases with little chance of litigation, leaving it to later experience to amend the statute by extending it to other cases.

COMMENT ON SECTION 2.

CUTTING GIFTS DOWN TO SIZE WHERE THE RULE IS EXCEEDED

Even after viewing facts which exist at the termination of valid life estates there may still be cases in which the postponement of vesting exceeds the permitted period of "lives in being plus 21 years."

In such cases, under existing law, the whole remainder is rendered void, even though the violation of the Rule is trifling in extent. Consider the same *Example*: T bequeaths the residue of his estate in trust to pay the income to A for life, then to pay the principal to the children of A who reach 25. A is a young man; all his children are born after T's death, and at A's death two of them are under 4 years of age. Under present law the entire remainder is void, and the estate passes to T's next of kin.

Under the proposed statute, the gift would be cut down to size instead of being rendered void. Thus the gift would be transformed into a gift "to such children of A as reach the age of 21." It is obvious that this comes closer to T's intent than to avoid the gift completely; it fully serves the purpose of the Rule by preventing the tying-up of property for longer than the permissible period.

The proposed statute is not a novel venture in the law. It is modelled upon Sec. 163 of the English Law of Property Act, 1925; this statute has been in effect for 28 years and is so simple in its application that not one single litigated case has been necessary to construe it. Also, the Supreme Court of New Hampshire in 1891 adopted this doctrine without aid of statute (*Edgerly v. Barker*, 66 *N. H.* 434, 31 *A.* 900) and difficulties have not arisen.

More inclusive projects for cutting void gifts down to size have been suggested. Section 5 of the Pennsylvania Estates Act of 1947 provides that where the Rule is violated the property will pass to the person then receiving the income. *Pa. Stat. Ann.* (*Purdon*, 1957), *tit.* 20, §301.5. Writers have recommended a full *cy pres* doctrine, applied by the court as in the case of a charitable trust that fails. *Quarles, "The Cy Pres Doctrine: Its Application to Cases Involving*

the Rule against Perpetuities, 21 *N.Y.U.L.Q. Rev.* 384 (1946); 6 *American Law of Property*, §24.11. But, once again, the draftsmen of the proposed Section 2 have considered it preferable to dispose of the great majority of cases by a simple statute unlikely to cause litigation than to try to remedy all cases by a less specific statute. Later experience (especially with the Pennsylvania statute) may indicate that this statute can be broadened by amendment.

COMMENT ON SECTION 3.

CLEARING TITLES, USUALLY OF CHURCHES, WHERE A FEE IS ENCUMBERED BY A RIGHT OF ENTRY OR POSSIBILITY OF REVERTER

At the present time the Rule against Perpetuities does not apply either to rights of entry for condition broken upon a fee simple or to possibilities of reverter. Usually these types of estates seek to limit the use of land.

Example: Suppose T wants to devise land to his Church but only so long as it is used for church purposes. He may frame his devise in any of the following ways:

(a) "To the Church in fee simple on condition that the land be used for church purposee, but if it ceases to be so used then my heirs may re-enter and repossess the premises as of my former estate." (When the premises cease to be so used, no matter how remotely, T's heirs have a right of entry. The Rule against Perpetuities does not apply.)

(b) "To the Church in fee simple so long as the premises are used for Church purposes." (When it ceases to be so used, no matter how remotely, the property automatically reverts to T's heirs. This is a possibility of reverter. The Rule against Perpetuities does not apply.)

(c) "To the Church in fee simple, but if it ceases to be used for Church purposes, then to A in fee simple." (The interest in A is an attempted executory devise. It is void under the Rule. The Church has a fee simple absolute.)

Two things are obvious. First, there is no reason why (a) and (b) should be valid while (c) is void; the exemption of the first two from any time limit is anomalous. Second, the first two, being exempt from the Rule, tie up the property very seriously, potentially forever. For an example, see *Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N. E. 2d 922 (1950)* and comments in *Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 Harv. L. Rev. 721, 741 (1952).*

Under the proposed statute these two interests continue to be valid; but if the contingency (non-church use) fails to occur within 30 years, then the Church has a fee simple absolute.

The period of 30 years is chosen because that is the duration

permitted by the Massachusetts statute as to restrictions on land where the period is not otherwise specified. *G.L. Ch. 184, Sec. 23.* It is also the period provided in a Minnesota statute similar to the proposed statute, which has been successfully in effect since 1937. *Minn. Stat. (1945)* §*500.20.*

Observe that, in the example given, the Church has a marketable title to the land after the 30 year period. But, as a charity subject to control of the Attorney General, if it sells the land it must put the proceeds to the charitable use. Normally these types of gift now defeat their own purpose by saddling the Church with land which, due to changing conditions in the neighborhood, is no longer well adapted to church purposes and, due to the form of the gift, can be used for nothing else.

In the proposed Section 3 appears the following phrase: "the succeeding interest, *which may be an executory interest.*" This is designed to take care of the case where a grantor or testator creates a determinable fee and then tries to give the succeeding interest to someone other than himself or his estate. This attempt to create an executory interest after a determinable fee now violates the Rule against Perpetuities. However, if the determinable fee is limited to 30 years there is no policy reason why the succeeding interest should not go to third persons as well as to the grantor or his estate.

Example: T devises land to his Church in fee so long as the same is used for church purposes and then to A in fee. Under the present law the executory devise to A is void; but the Church has only a determinable fee; and that leaves a possibility of reverter in T's heirs, this latter interest being exempt from the Rule against Perpetuities. *First Universalist Society v. Boland, 155 Mass. 171 (1892).* Under the proposed Section 3 the Church would have a fee simple absolute if it used the property for church purposes for 30 years; if such use ended before 30 years then the fee would pass to A.

COMMENT ON SECTION 4.

Sections 1 and 2 are intended to validate certain gifts that would be invalid under present anomalous applications of the Rule against Perpetuities. If present law renders a gift valid, Sections 1 and 2 are not called into action.

COMMENT NO SECTION 5.

This proposed statute is intended to be prospective, not retroactive. Constitutional problems would be inherent in any attempt to make the statute retroactive. However, where a power has been created before the statute but is exercisd thereafter, the statute is intended to apply to the interests created in the exercise of the power.

Matters Not Included in Proposed Statute.

The draftsmen of this statute considered attempting to define in the Act the date from which the period of perpetuities runs in various situations—e.g. revocable trust, exercise of power of appointment, remainder where life tenant has full power to consume principal. It was concluded that this would not be wise. The matter is quite well established by decisions in this state, though some doubtful areas still remain. An attempt to treat this subject legislatively would complicate the Act to the point where it would be comprehensible only to those who are already specialists in this field or are prepared to devote substantial research and study thereto.

The subject of options was raised. There are many who believe that the application of the Rule against Perpetuities to options is unsound. Therefore, should not the Act (a) eliminate the Rule against Perpetuities with reference to options, or (b) treat options in the same way as rights of entry—valid for 30 years, invalid thereafter? It was concluded that a statute putting a time limit on options might raise more issues than it resolves. As to exempting options from the Rule it was felt that the number of cases that have arisen or are likely to arise is too small to justify this addition to the statute.

The purpose throughout has been to present a statute that is as simple and understandable as possible, that covers the great bulk of cases, and that is unlikely to require substantial judicial construction.

GOD HELP MASSACHUSETTS LAND OWNERS

The Creeping Paralysis of Federal Power and its Assertions and Interpretations

"The Increasing Importance of State Supreme Courts"

We have referred, repeatedly, to the gradual undermining of the structure of our government by the political, sometimes idealistic, erosive laxity of "vigilant" thinking which results in the steady but often overlooked accretion of Federal power—an obvious objective of a totalitarian government. We are aware that some of our friends believe in this tendency in varying and uncertain degrees. In view of the extent of this continuing accretion—a little here, a little there and so on, we believe the only effective bulwark of the principle of local self government is the State Supreme Courts. Accordingly, we again call attention to what we said in the "Quarterly" for April 1953 (at p. 60) in connection with the peculiarly local matter of land titles, as follows:—

"We respectfully suggest that our 'only security is the constant practice of critical thinking' by our courts in the interpretation of Federal statutes in these days of expanding Federal power. Such power cannot be 'appeased'. If our dual system of government is to survive, the language of statutes must be challenged judicially as well as by the bar. Congress should be forced to be explicit in unmistakable statutory words when, as and if, it really intends to exercise whatever power it has to violate the great American principle of local self-government under our constitution.

"In the McHugh case 326 Mass. 249 the court quoted (at p. 265) the statement of the Supreme Court of the United States that

" 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved power of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.'

"In the article by the late Walter Armstrong on 'The Increasing Importance of State Supreme Courts', referred to in our December issue p. 24, note, he said:

" 'A great State Supreme Court construing the Federal Constitution, in a case where there is no binding precedent, will not merely engage in a guessing contest as to the view the Supreme Court of the United States will take, but will arrive at its independent conclusion and state its own views. If this feeling of independence comes to pervade the State Courts to as full an extent as I believe it will, we have a right to expect from them great opinions expounding the Federal Constitution —opinions that will challenge the attention of the nation and materially influence the development of constitutional law.'

"In Youngblood v. U. S. 141 Fed. 2nd 912, at p. 914, the Court of Appeals for the 6th Circuit said, 'A State's right to safeguard muniments of title to land within its borders should not be lightly denied on a strained assumption that Congress meant to impeach that right.' The court sustained a requirement that the collector should provide a description."

We invite further contributions on the problem and welcome the privilege of printing the following discussion from a particularly level headed and experienced practitioner. F. W. G.

FEDERAL TAX LIENS AND MORTGAGES

By JOHN A. MCCARTY

Recent Federal Statutes have been interpreted by divided Federal courts in a manner which, if applied in the same way to Massachusetts, will change the very basis of our law of real estate. I refer specifically to the Federal Tax Lien Statute and to the

claims made by bankruptcy courts in cases of foreclosure of mortgages made by persons who have later become bankrupt.

I propose in this article to deal briefly with the lien question, and, at some future time, to discuss the bankruptcy matter which I believe to be of equal importance. Both these matters indicate a further encroachment on local government the rights of the state which if not actively resisted will fundamentally change our real estate law.

Allow me to illustrate. In 1945 John Jones purchased a parcel of real estate in Massachusetts and at the same time gave a mortgage to the X Bank for a term of twenty years. The deed to Jones and the mortgage to the Bank were executed and recorded at the same time and were part of the same transaction. In 1950 Jones sold this real estate to Brown, subject to the mortgage to the X Bank. Of course the bank had no control over such sale and in fact did not even need to know about it. However, it was not harmed since its security was not impaired. It still held a first mortgage on the real estate and was therefore protected in its investment. In 1952 Brown became involved in income tax difficulties with the Federal government as a result of which a lien for his income tax was recorded in the registry of deeds where the deed and mortgage were recorded.

This was done under the provision of Section 3670 of the Code, which provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon *all property and rights to property, whether real or personal, belonging to such person.*"

Section 3672 of said Code provides: "that the lien shall not be valid against any mortgage, pledgee, purchaser, or judgment creditor until notice is filed in an office designated by State law or in the office of the clerk of the United States district court."

Under the Massachusetts statute, the office for filing such lien is the registry district where the land lies.

In 1953 the mortgage originally given by Jones on the property now owned by Brown was in default and the bank foreclosed its mortgage both by entry and by exercise of the power of sale therein contained. It would be reasonable to suppose that this foreclosure sale conveyed a good title to the purchaser since the real estate was security for the loan, but under the doctrine of Metropolitan Life Insurance Company vs. United States 107 Fed. 2d 311 Circuit Court of Appeals, 6th Circuit, this may not be so. In that case it was decided that the foreclosure of the first mortgage did not cut off the tax lien filed by the Federal government subsequent to the recording of the mortgage. The court held in part: "No policy of the state may interfere with the power of Congress to levy and collect taxes. Federal statutes create specific liens for taxes and give a specific remedy for their removal, and when such

liens are once attached they may be lifted only as provided thereunder."

This case further decides that under the applicable Federal statutes, any person having a lien upon real estate recorded prior to the filing of notice of the tax lien may file in chancery in the district court a bill for removal of the tax lien. As a condition the plaintiff must obtain an order of the district court for filing and must show a written request of six months or more to the Commissioner of Internal Revenue to file a bill to enforce the government lien. In all such cases the court shall decree a sale of such real estate and distribution of the proceeds according to the findings of the court in respect to the interest of the parties and of the United States.

The Circuit Court upheld the district court in its decision that the tax lien was not extinguished by the foreclosure of the prior mortgage but was inferior to such mortgage and ordered the property to be sold and the proceeds first applied to the mortgagee's claim and the balance, if any, to be paid to the Federal government.

This case in effect held that where a Federal lien has attached subsequent to a mortgage that the mortgagee cannot by foreclosing the mortgage convey a good marketable title. That, even after such foreclosure, the Federal lien remains unextinguished and that the only way to get rid of such Federal lien is by following the requirements provided in the Federal statute.

The United States Supreme Court, October Term 1939, No. 878, denied a petition for a writ of certiorari from the Circuit Court of Appeals of the 6th District reported in 107 Fed. 2d 311, but the denial of certiorari does not determine Federal law. As Mr. Justice Frankfurter said (see 37 M. L. Q. No. 4, Dec. 1952, 24):

> "It means, and all that it means is, that there were not four members of the court to whom the grounds on which the decision of the court of appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari."

An unconfirmed opinion of a Federal circuit court (especially a divided opinion as in the Metropolitan Life Ins. case, with a powerful dissent) is no more a binding precedent of Federal law in Massachusetts than a similar opinion of another state Court, from which Federal questions may be carried directly to Washington. The question of law is open in Massachusetts where the facts are different for it must be borne in mind that the case above cited originated in Michigan where in theory a mortgage is much different from a mortgage in Massachusetts. Reeves on Real Property, Vol. 2, 1050 says:

"In New York, Michigan, Wisconsin, California and the great majority of the American states the mortgage is treated as conferring upon the mortgagee merely a lien on the land, which is only personalty in his hands and as leaving the legal title and estate in the hands of the mortgagor.

"In England, Massachusetts, New Hampshire, Maine, Illinois and probably in some other states the legal title to the land is transferred by the mortgagor to the first mortgagee and the mortgagor retains only an equitable interest or estate in the property . . . his equity of redemption".

These two statements from Reeves can be substantiated by innumerable cases.

Applying then these different theories to the Federal Lien Statute and the Metropolitan Life Insurance case we should come to very different conclusions. The Federal Lien Statute (Sec. 3670) provides for a lien "upon all property and right to property whether real or personal belonging to such person". Now in Michigan the mortgagor retains legal title and the mortgagee has only a lien upon it; therefore, there is property belonging to the mortgagor to which the Federal Lien can attach.

The Metropolitan case holds that once such lien has attached it can be removed only in the manner set up by the statute. Although I do not agree with this decision, it is not my purpose here to criticize the case as applied to states which have themselves adopted the lien theory in their law of mortgages.

But let us consider what a mortgage really is under Massachusetts law. When the mortgagor gives a mortgage on real estate, the legal title to the real estate passes to the mortgagee, a mortgage being a warranty deed with a condition inserted. G. L. Ch. 183, Sec. 18, 19, 20 and 21. The mortgagor retains only the right to redeem by performing the conditions of the mortgage.

It is true that for most practical purposes the mortgagor is considered the owner of the mortgaged real estate. He can occupy it or lease it or sell it. It is subject to attachments and liens for claims against him, but he cannot affect the title of the first mortgagee and in foreclosure proceedings the question of title becomes important. If the mortgage is merely a lien, proceedings for the foreclosure of the lien must be taken in court. If it is a conveyance, as in Massachusetts, the mortgagee has a right to immediate possession upon breach of condition.

The methods of foreclosing a mortgage in Massachusetts depend entirely upon the validity of the conveyance theory.

It was said in Ritger v. Parker, 8 Cush. 145: "If the mortgage is foreclosed, then the estate, which was conditional and defeasible in its creation, becomes absolute; and the incidents, privileges, and covenants attached to it, unchanged by anything which the mortgagor *or any other person* may have done in the meantime, remain attached to it as if the original conveyance had been absolute".

Under the form of mortgage in use prior to the Short Form Act, G. L. Ch. 183, and now under the provision of Sec. 26 of said Chapter, the mortgagor retains the use and profits of the land mortgaged unless otherwise stated in the mortgage so long as he fulfills the conditions of the mortgage, but immediately upon breach of any condition, the mortgagee has the right to enter on the

mortgaged premises and expel the mortgagor. This is on the theory that the title to the real estate is in the mortgagee. There has been no change in this procedure in Massachusetts, except certain statutory provisions to prevent immediate and harsh foreclosure. That is, the law now provides that after a condition of the mortgage has been broken, the mortgagee may still make entry but must do so in the presence of two witnesses and a certificate of these witnesses to the fact of entry must be recorded in the registry of deeds where the land lies. The mortgagor is given three years in which to redeem, G. L. Ch. 244 Sec. 1 and 2, but if he fails to do so, at the end of three years without any other action being taken by the mortgagee, the right of redemption is forever foreclosed and the fee in the mortgaged real estate vests in the mortgagee absolutely and without condition. This method of foreclosure can be defended only on the theory that legal title is already in the mortgagee from the time he acquired the mortgage.

At the present time a power of sale is contained in practically all mortgages, but a power of sale is no necessary part of a mortgage, it is simply an agreement between the mortgagor and the mortgagee that in case a default occurs on the part of the mortgagor, the mortgagee does not have to wait three years as he would if he foreclosed by entry alone, but may sell the property for the purpose of foreclosing the right of redemption held by the mortgagor.

It must be borne in mind that at a foreclosure sale, it is the mortgagee who sells the property and gives the deed and therefore the title passes from him to the purchaser at the sale, again showing that the title is in the mortgagee and that the only purpose of the sale is to cut off the mortgagor's equity of redemption.

This methd of foreclosure common in New England also shows conclusively that title to the mortgaged property is in the mortgagee and not in the mortgagor, and even a cursory review of the cases will show that the power of sale commonly contained in mortgages at the present time does not in any way change the theory which has been held in Massachusetts from the beginning that title to the mortgaged premises is in the mortgagee.

That being so, when a Federal tax lien is recorded against a mortgagor it can be effective under our law only as any other lien inferior to the mortgage and subject to being cut off by foreclosure. If we concede as many have that the doctrine of the Metropolitan Life Insurance case applies in Massachusetts, then I submit we must surrender the Massachusetts theory of the law of mortgages which has prevailed in this State from the very beginning, and in fact which comes down to us from the English Common Law which has been in existence for centuries. I submit further that if we do so we are surrendering the powers of the Commonwealth of Massachusetts to legislate on and decide matters per-

taining to the law of real estate and submitting to a usurpation by the Federal government.

I do not believe the Metropolitan Life Insurance case is authority for any such principle. In fact, in that case the Circuit Court of Appeals held, among other things, that:

1. "The lien of the Government attaches to all property in possession of the taxpayer to the extent of his interest in and right thereto. . . ."

but in Massachusetts the interest of the mortgagor taxpayer is only an equity of redemption.

2. Since the Federal statutes do not define the term 'property', or the rights attaching thereto, we must turn to the State law for their meaning".

and the Massachusetts law is that the title to mortgaged real estate passes to the mortgagee.

3. "The taxpayer mortgagor had an interest in the property at the time the lien of the U. S. attached".

but in Massachusetts the interest was merely an equity of redemption.

4. "The mortgagee creditor of the taxpayer mortgagor did not acquire title to the lands in lien to it until the sale."

but in Massachusetts this is not so. Title passes by the mortgagee and the foreclosure sale is merely to cut off the equity of redemption.

There is one other specific finding in the Metropolitan Life Insurance case which seems to me to require particular attention.

In that case the Metropolitan Life Insurance Company acquired three power of sale mortgages on three separate parcels by assignment. Subsequent to the recording of these mortgages a Federal tax lien had been recorded against the mortgagor. Metropolitan foreclosed its mortgages by exercise of the power of sale. Later the question of the validity of the tax lien having arisen, Metropolitan brought an action in the District Court of the United States asking that the lien *if any* be extinguished.

The Circuit Court of Appeals, among other things, held that "appellants action is predicated on the theory that the United States has some sort of lien on the premises which it was seeking to lift in accordance with the terms of the statute. Since the statute does not expressly or impliedly give the Court power to discharge the lien by decree, the only statutory method by which it may be done is sale".

This language in no way indicates that a Federal lien would not be extinguished by the foreclosure of a prior mortgage in Massachusetts.

If we, and especially if our courts, recognize the existence of such Federal tax lien after the foreclosure of a prior mortgage, we will be submitting to the power of Congress and the Federal Courts to change our real estate law and we must abandon our theory of mortgages and adopt the lien theory.

If there is a Federal lien recorded against the mortgagor, we can no longer foreclose a mortgage in accordance with our statutes and decisions and then convey a good marketable title. We will have to go to the Federal Court to remove a lien and the action must be "predicated on the theory that the U. S. has some sort of lien", when as a matter of fact, our whole law of real estate and all our decisions up to the present time at least are conclusive on the law that legal title vests in the first mortgagee and all subsequent mortgages, liens, attachments or other encumbrances made or suffered by the mortgagor are cut off by its foreclosure.

It might be argued that this reasoning is contrary to the law of this Commonwealth with regard to our own local tax liens for nonpayment of real estate taxes, but I submit such argument is not pertinent because the statutes giving priority to a real estate tax lien are State statutes, and without question the State has authority to legislate on the law of real estate within its jurisdiction.

Now the great danger in this question is not merely whether or not a Federal tax lien is good in Massachusetts after foreclosure of a prior mortgage, the question involved is basic and may be briefly stated in this way: To what extent has the Federal government by act of Congress the power to enact a statute affecting the title to real estate and the method of conveying real estate in Massachusetts? Stated another way: Can the Federal government force the Commonwealth of Massachusetts to adopt the lien theory and give up the common law theory in its law of mortgages? In order to hold that the doctrine of the Metropolitan Life Insurance case applies to Massachusetts these questions must be answered in the affirmative. If Congress has such power it can use it further, and our real estate law will come to depend on Federal statutes and their interpretation by Federal Courts.

I submit 1st that the Federal lien statute does not by its terms apply to property in Massachusetts belonging to a mortgagee—that it applies only to an equitable interest to "redeem"; that to give it any other interpretation would be a violation of state law in violation of the 10th amendment and in violation of the "cardinal rule" of interpretation which avoids violation of the constitution.

MORE ABOUT OLD AGE ASSISTANCE LIENS AND MORTGAGES

We discussed this subject in the October issue, pp. 10-11, and asked for comment. We have received a practical suggestion which deserves attention in connection with foreclosure notices and deeds. It has been suggested that in the case stated in October on p. 11, a ground for refusing the title of a purchaser at the mortgage foreclosure sale because of an old age assistance lien recorded after

the mortgage, may have been that the notice of the foreclosure sale and the deed stated that it would be subject to "municipal liens" thus raising a question of marketability because an old age assistance lien is a "municipal lien". Hence the doubt. Considering the necessary conveyancing caution about doubts, this is understandable, but, we submit, unfounded. The recital adds nothing except somebody's doubt. Section 14 of Chapter 244 quoted in October (p. 11) states that the foreclosure deed is subject to "municipal" taxes, liens and "existing encumbrances of record—whether or not reference to such . . . heirs or encumbrances is made in the deed". Section 14 does not define the "liens" referred to, but under Chapter 118A, as amended by St. 1951, Chapter 801, an old age assistance lien is not "created" until recorded. Accordingly, reading the statutes together, such a lien, unlike some others, *must* be "an encumbrance of record", and if not so recorded there is no such lien "created prior to the mortgage".

In other words, the legislature provided in clear words the intention not to wreck title by violating the principle of the recording acts. We have plenty of vague statutes, but when the legislature is careful to be clear, don't create unnecessary doubts by misleading recitals in foreclosure notices and deeds. The matter may face any lawyer.

We again invite a convincing answer, if there is one which we do not see.

F. W. G.

THE OTHER OLD AGE ASSISTANCE PROBLEM

We also printed in the October issue a letter of Philip H. Ball, Jr., of Greenfield about a certain administrative practice of the Public Welfare Offices which he illegal and unjust in its results. He asked for discussion in the "Quarterly", rather than applying to the courts, because "the persons concerned do not have money available to assert their rights through legal proceedings". He stated (p. 17) that he had had telephone conferences or correspondence, or both, with the local Welfare Office, the head of the Springfield District Office, the State Director of Field Operations and the department of the Attorney General who advises the Department of Public Welfare on legal questions, but that "none seem to grasp" the problem and "Apparently we have a state wide situation where the law says one thing and the operating regulations of the Administrative Department say something completely inconsistent with the law. The pathetic part about it is that the old people who need the semi-monthly checks for the bare necessities of life are in no position to assert their rights."

There are, of course, many serious questions of law which never come near a court—more today than ever before—because of lack of funds. Most law is administered outside of a court house by the

bar, by advice and draftsmanship or administrative boards. That is the reason for discussing some of the problems in the "Quarterly" for the profession and those in power to think about.

We stated our belief that Mr. Ball was right in his view of the law and asked for comment. We have received a number of letters from thoughtful members of the bar also agreeing with Mr. Ball. We respectfully suggest that the matter deserves the attention of all the welfare officials and that the practice described by Mr. Ball should be corrected unless there is an answer which we do see.

F. W. G.

RETIREMENT FUNDS FOR SELF-EMPLOYED AND OTHERS NOT COVERED BY EXISTING PENSION PLANS

Four identical bills now pending in Congress provide a practical approach to the following problem—how can lawyers and other self-employed professional men provide for their old age and possible retirement, and for their families upon death?

These bills, for convenient reference called the Reed-Jenkins-Keogh bills, are H. R. 10, H. R. 11, H. R. 2692 and H. R. 6114, severally introduced in Congress in the last session by Representatives Jenkins (R., Ohio), Keogh (D., New York), Camp (D., Georgia), and Elliott (D., Alabama). These bills represent revisions of prior bills, one sponsored by Representative Reed introduced in the prior session. These bills are sponsored by a special committee of the American Bar Association on retirement benefits and by corresponding committees of other professional organizations.

In general these identical bills may be summarized as follows: They provide that any "qualified individual" may deduct from his gross income for Federal income tax purposes in any year, subject to certain limitations, that portion of his earned income which he has contributed to a "restricted retirement fund to be managed by a Trustee" or paid to a life insurance company as premium under a "restricted retirement annuity contract." A "qualified individual" is defined as "one not eligible to participate in a pension or profit-sharing plan qualified under Section 165 of the Internal Revenue Code, or established by a Governmental or charitable employer." It thus covers not only self-employed lawyers and partners in law firms, but also employees of partnerships or corporations which have no qualified pension or profit-sharing plan. Even if eligible for benefits under a qualified plan, if an individual is also self-employed and more than 75% of his earned income results from that self-employment he is also a "qualified individual." The amount deductible in each year cannot exceed 10% of his earned income, or $7,500, whichever is less, and there is a lifetime limitation

of $150,000. The income on the amount so paid to a Trustee or insurance company is exempt from income tax under provisions similar to those exempting income accumulated in corporate pension or profit-sharing funds.

Upon reaching 65 years of age the taxpayer has the option of withdrawing the accumulated fund in annual instalments or in a lump sum. If he elects to receive the sum on an instalment basis, he pays at ordinary income tax rates on the amount received. If he elects to take his entire interest in the fund in a lump sum payment, after accumulation for more than five years, he may treat the distribution as a long term capital gain—again under conditions similar to those applicable to corporate pension and profit-sharing plans.

These bills recognize the principle of equality in tax treatment and give to the self-employed tax treatment comparable to that now afforded to officers and employees of corporations.

These bills are not an alternative to social security coverage but would be supplemental to social security. Lawyers are now excluded from social security coverage. The Massachusetts Bar Association on May 23, 1953 went on record as favoring the extension of the social security law at least to the extent of covering those lawyers who wish to take advantage thereof. Whether or not the social security laws are amended to include lawyers, social security is intended to provide only the first necessary minimum level of protection for old age. The Jenkins-Keogh bills would provide a second layer of protection, supplementary to social security. Officers and employees of corporations are now automatically covered by social security, and pension and profit-sharing plans furnish a second layer of protection for old age.

The benefits of the bills are largely concentrated in three points, 1) deferment of Federal tax from the period of high earnings at high rates to a later period of lower earnings at lower rates, 2) the exemption from all income tax on the income on the funds being accumulated, and 3) the opportunity for systematic savings in supervised funds which by their size permit a degree of diversification of investments beyond the means of ordinary individuals.

In testimony before the Ways and Means Committee of the House of Representatives, the chairman of the American Bar Association special committee stressed four factors.

1. "Under the present law and under the present economic conditions, it is so difficult as to be practically impossible for a young man in any of our professions, or who employs himself in any activity in which capital gains are not likely, to save enough money adequately to protect himself and his family in case of retirement and old age."

2. "There is discrimination in the Tax Laws against the self-employed. Congress has substantially helped the retirement problem for officers and employees of corporations by enacting legislation (Section 165 of the Internal Revenue Code) which, by granting certain tax benefits to approved corporation pension plans, has so encouraged the establishment of such plans that approximately 20,000 approved plans are now in existence covering an estimated ten million employees including executives. Employees participating in these plans under the statute do not have to include their employer's contributions in their individual gross income until pensions are received, and the company contributions are deductible by the employer in the year made. There is no comparable legislation for the self-employed. As President Eisenhower has said: 'There are over ten million workers who cannot take advantage of these tax relief provisions now offered to corporations and their employees. They include owners of small businesses, doctors, lawyers, architects, accountants, farmers, artists, singers, writers—independent people of every kind and description but who are not regularly employed by a corporation. I think something ought to be done to help these people to help themselves by allowing a reasonable tax deduction for money put aside by them for their savings. This would encourage and assist them to provide their own funds for their old age and retirement.' The Democratic National Platform took a similar position."

3. In the case of the professions there is a vast difference in the earned income received in the most productive years and that received in later life. These bills permit self-employed persons, on an individual basis, to achieve a measure of averaging their income for tax purposes.

4. "Largely as a result of the greater security offered by corporations to their employees and executives as compared with self-employment, there has been a drifting away from the professions and from self-employment toward employment by large corporations." Many lawyers, while considering the independent practice of law more attractive, appear to feel that in justice to themselves and their families they cannot refuse the greater security afforded by the corporation through its pension plan.

A point frequently made by legislators in discussing these bills is that the Federal government may not be able to afford the loss

of revenue resulting from permitting an additional deduction. The legislation now proposed was revised in detail by an excellent article in the April 1953 issue of the Harvard Law Review, pages 1105 et seq., and this particular objection was answered therein as follows: "But even the possibility that the revenue loss would be so considerable as to necessitate higher tax rates is not a valid objection. It seems more equitable to distribute the tax burden among all taxpayers than to continue the discrimination against one group."

The technical details of the bills were also reviewed in a report of the Subcommittee on Federal Taxation of the Boston Bar Association appearing on page 121 et seq. of the May 1953 issue of the Bar Bulletin.

Further analyses and extended discussions appear in the testimony by the American Bar Association and American Medical Association before the House Committee on Ways and Means on August 12, 1953.

It would appear appropriate that the Massachusetts Bar Association take a position with respect to these Jenkins-Keogh bills and place itself on record urging their enactment by Congress. Suggested resolutions are submitted herewith, for possible consideration at the mid-winter meeting in Springfield.

Suggested Resolutions

1. That the Massachusetts Bar Association approves in principle legislation embodying the substance of H. R. 10 and H. R. 11, the so-called Jenkins-Keogh Bills introduced in the last session of Congress, providing for postponement of Federal income tax with respect to a portion of earned income paid to restricted retirement funds by self-employed and others not covered by existing pension plans.

2. That the officers of this Association are hereby authorized and directed, through such committees or members as they may designate, to communicate the foregoing resolution to United States Senators and Representatives from Massachusetts, and members of appropriate committees of Congress; and to take such other action with respect to urging the enactment of such legislation as the officers of this Association may deem appropriate.

CHARLES D. POST.

SUPERIOR COURT RULE 23 STILL A PITFALL

The second paragraph of Rule 23 reads:

> "If a demurrer is sustained, and leave to amend is not denied, a case shall be deemed ripe for final judgment or decree only after ten days from the sustaining of the demurrer, or such other time as the court may allow for amendment, and then only after the disposition of any motion to amend the plead-

> ing demurred to, filed within such time. After the expiration of such time no motion to amend such pleading shall be filed without leave of court."

This rule was adopted in 1932 and, shortly after its adoption, Chief Justice Rugg stated: "The substance and effect of the rule are that a party plaintiff, to whose declaration or bill in equity a demurrer has been sustained, *in the absence of waiver or order by court,* is allowed ten days within which to decide whether he can, or ought to, file a motion for amendment". (See Kaufman v. Buckley 285 Mass. 83 at p. 86) and in the earlier case in the same year (1933) the court had said: "Because no such motion [to amend] was filed it was inferable that the plaintiff elected to stand on his declaration in the form in which it was before the Superior Court. We think the plaintiff should be held to have made the election" (See Robitaille v. Morse, 283 Mass. 27 at p. 35).

In 1938 in Whitney vs. Whitney 299 Mass. 547 at p. 551 Chief Justice Rugg said:

> The doctrine of RES JUDICATA, therefore, applies where the issues have in fact been fully tried *and in cases where the plaintiff has had ample opportunity to state his cause of action completely and correctly so as to have the issues tried but has refused to embrace that opportunity.*

In 1943 in Elfman v. Glaser 313 Mass. 370 where there was an order "Demurrer sustained with leave to plaintiff to amend within ten days", the court said at pp. 374-375 that such leave had the same meaning as "ample time", and ten days was ample time and that "failure" to take advantage of the opportunity was equivalent to "refusal or declination" which have "no more significance in this connection than failure so to do. See Freeman on Judgments (5th Ed.) ss. 747".

In 1950 in Hacker v. Beck 325 Mass. 594 the court re-interpreted Rule 23 as follows (at p. 598):

> "The exception to the general rule making a judgment after demurrer a bar to the second action requires the concurrence of two particular factors—neither of which is covered by the said court rule—first, a leave to amend expressly granted and, second, a refusal to accept the privilege. That both are essential to constitute the exception to the general rule was carefully pointed out in Elfman v. Glaser, 313 Mass. 370, 374-375."

We find it difficult to read the Rule 23 as quoted above or Elfman v. Glaser and then to understand the interpretation quoted from Hacker v. Beck.

We find it difficult to see any purpose in the adoption of Rule 23 in 1932, unless it was to provide a "definite period of ten days as "ample opportunity" to start the amendment process unless the court by special order allowed a different and perhaps a longer period (such as 30 days in Keown v. Keown, 231 Mass. 404).

The Massachusetts Law Quarterly for April 1953 printed the preliminary report of the Committee on Rules of the Superior Court

with a request from that Committee for suggestions. On pp. 36-37 a discussion of Rule 23 as a "pitfall" was printed and a revised draft of the rule submitted on p. 37 as a suggestion. This discussion and draft was considered by the Judicial Council at its meeting on April 15, 1953. "After discussion it was voted to recommend that Rule 23 be amended by revising the second paragraph as suggested in the 'Quarterly' at the bottom of page 37 for the reason stated on pp. 36-37." This recommendation was submitted to the Committee on Rules. The revised rules, which take effect January 1st, have made no change in Rule 23.

We respectfully submit that in the interests of justice the second paragraph of the rule should be clarified or repealed, or supplemented by a standing "order" under Section 71 of Chapter 231 that (as some judges do now) every judge when sustaining a demurrer shall issue a special order and that the order sustaining the demurrer shall imply such a 10 day order to be entered on the docket and on the order by the clerk if an express order is not made. It would seem that rules of court should guide and not mislead practitioners at the expense of their clients. Meanwhile counsel for defendant should ask for an express ten day leave for plaintiff to amend if a demurrer to the declaration is sustained.

F. W. G.

PROGRESS REPORT ON DISTRICT COURT REORGANIZATION

By LIVINGSTON HALL*

A district court reorganization bill passed the Massachusetts Senate in the closing days of the 1953 session, but failed of passage in the House of Representatives. The original District Court Survey Committee draft act (Senate No. 247) was heard before the Committee on Judiciary on March 4, by Senate Order No. 713 in May the Committee was authorized to study the matter further and to report its recommendations in June. A redraft of the original draft act, simplified and much improved in many respects, was reported favorably in Senate No. 784 by Senator Ralph V. Clampit for the Committee on the Judiciary on June 30. The redraft was amended on the floor of the Senate by striking out a provision for graduated pensions for district court justices retiring within one year from the effective date of the act, and by adding the justices of the Municipal Court of the City of Boston to the list of full-time justices. As amended, the revised bill passed the Senate by a vote of 24-11 on July 2.

The revised bill with its Senate amendments came before the House of Representatives on July 3, the last day of the session.

*Chairman, District Court Survey Committee, Harvard Law School, Cambridge 38, Mass.

House No. 2881, calling for further study by an unpaid special commission of 11, was substituted in its place by a vote of 131-95 in the House. The Senate, as one of its last acts on July 3, approved this substitution, which appears as Chapter 98 of the Resolves. The commission is directed to make "an investigation and study relative to the reorganization of the district court and the extension of full-time judicial service" and "to consider the subject matter of current Senate document numbered 784." It is to file its report not later than December 30, 1953.[1]

The Hearings Before the Special Commission

The commission has held public hearings in various parts of the commonwealth, including Worcester and Springfield. With "virtual agreement on the desirability of extending the principle of full-time service," Sen. Innes, its chairman, has emphasized that the commission was seeking to have those testifying at the hearings address themselves to the following questions as far as possible:

"1. How shall the initial selection be made of the particular courts or judges to be put on a full-time basis—by the Legislature, by the Governor and Council, or by some other body such as the Supreme Judicial Court? Should a particular judge or a particular court be selected for full-time service?

"2. Should part-time judges be retained for criminal cases only? If this is done, should the presiding justices or the special justices be retained for this purpose?

"3. To encourage District Court trials of motor vehicle tort cases to end the congestion of such cases in the Superior Court, should all civil cases including motor vehicle torts be heard by full-time judges? If this is done, should there be some provisions for part-time judges to sit in civil cases in emergencies?

"4. Should judicial areas larger than a single county be established as circuits for full-time judges?

"5. Should the total number of special judges be reduced? Should some be retained for a larger judicial district?

"6. Should judges who may be designated for full-time service have the option of refusing full-time service and retaining their present salary?

"7. Should the commission abandon the objective of 100 per cent full-time service by judges of the District Courts now or in the future?

[1]The members of the commission are Sen. Charles J. Innes (R—Boston) chairman; Sen. Newland H. Holmes (R—Weymouth); Sen. John F. Collins (D—Boston); Rep. J. Philip Howard (R—Westminster) vice-chairman; Rep. H. Edward Snow (R—Natick); Rep. Gardner E. Campbell (R—Wakefield); Rep. James L. O'Dea, Jr. (D—Lowell); Robert W. Bodfish, Esq., of Springfield, President of the Massachusetts Bar Association; Daniel J. Daley, Esq., of Brookline; and Roy K. Patch, Esq., of Salem.

"8. All proposals before the commission contemplate retaining all present District Courts with their present justices, clerks, and other personnel. In courts not made full-time, should vacancies be filled by appointment of additional full-time judges sitting on a circuit basis, should other part-time judges be appointed to the vacancies, or should a combination of the two methods be recommended?"

The Survey Committee's New Draft Act Senate No. ———

In the meantime, the District Court Survey Committee has filed a draft act for the 1954 legislative session which carries forward the general plan of Senate No. 784 of 1953, in the form in which it passed the Senate last July. Full-time justices at $12,000 salaries are provided for 34 of the District Courts, including additional judges for Essex, Middlesex, Suffolk and Worcester counties. The draft act also provides for the eventual appointment of one more full-time justice in each of the counties of Berkshire, Bristol, Essex, Middlesex, Norfolk and Plymouth, and two in the county of Hampden.

Civil cases would normally be heard only by full-time justices, except for supplementary proceedings, summary proceedings, small claims and proceedings affecting juveniles and insane persons. But the draft act permits the Administrative Committee of the District Courts to authorize other justices and special justices to hear all civil cases in such courts as the public convenience may require, or wherever the regularly assigned justices are absent or otherwise unable to sit.

Section 6B of the draft act provides for daily criminal sessions in all courts as needed for unbailed defendants, to eliminate any problem of police transportation, so long as there are sufficient justices and special justices available. If and when this should become impracticable, the situation must be reported to the Administrative Committee, which is expressly given the power to "report to the Governor and to the general court its recommendations, with drafts of legislation necessary to carry such recommendations into effect, relative to any matters affecting the administration of the District Courts".

The present special justices remain an integral part of the system. Since no new part-time justices or special justices are to be appointed, the provision for daily criminal sessions if needed, and the modified provision with regard to civil cases, insure a high level of activity for the present special justices until they wish to retire.

The draft act retains all the present District Courts with their present justices, clerks, probation officers, and other personnel. It does not apply at all to the courts in Barnstable, Nantucket and Dukes counties, or to the Municipal Court of the City of Boston.

CHIEF JUSTICE TANEY'S FINANCES

By LEE M. FRIEDMAN

"The Counsellor" first appeared in 1891, published by the New York Law School, then opening under Professor Theodore W. Dwight, to maintain the lecture and textbook system of teaching law then being challenged by the new "case" system introduced by Dean Langdell at Harvard. The public was informed by the school that "like Minerva, it springs into existence fully equipped" with an enrollment of 345 students, when, it pointed out, the Harvard Law School had only 355 students.

In the January issue of "The Counsellor" in 1892 Simon Sterne, of the New York Bar, wrote an article advocating increased judicial compensation. He proposed that the United States should furnish each judge of the Supreme Court free, a home in Washington, a salary of $12,000 (Chief Justice, $15,000) and on the death of a justice, a pension of from $3,000 to $5,000 for his family.

Simon Sterne was an outstanding lawyer in New York. Born in 1839, he had studied law at the University of Pennsylvania and in the office of the distinguished Judge Sharswood and John H. Markland in Philadelphia, before beginning practice in New York in 1860.

To show the inadequacy of the salaries paid the Supreme Court Justices, he described the living conditions of Chief Justice Taney as follows:

> "I remember with a distinctness which, owing to the circumstances, can never be effaced from my memory, going, when a boy, with my preceptor, John H. Markland, of Philadelphia, to call upon Chief Justice Taney at Washington. We found that legal luminary living, with his family, over a candyshop on Pennsylvania avenue, between Fourth and Fifth streets. The chamber in which the Chief Justice of the United States wrote his opinions was partitioned off by a calico curtain from another apartment in which, apparently, was done the family cooking. Of course, there was an impressiveness and an air of refinement which emanated from the dignity of his person and which no mean surroundings could overcome; and there was also the stamp of superiority given by the law books which filled the pine wood shelves."

THE MASSACHUSETTS ARCHIVES AGAIN

In the October issue we called attention to a bill filed by the Secretary of the Commonwealth, for a study of how to care for the archives. The matter was emphasized by the high school boys when they took over the State House on "Good Government day." Mr. Brewer of the New Bedford Standard publicized it. The Massachusetts Civic League is leading a movement in support. Write your senator and representative to protect our rare sources of American history. F. W. G.

Public Document

No. 144

TWENTY-NINTH REPORT

Judicial Council of Massachusetts For 1953

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THE INDEX OF THE REPORTS AND LIST OF STATUTES PASSED ON RECOMMENDATION OF THE JUDICATURE COMMISSION AND OF THE JUDICIAL COUNCIL SINCE 1919.

For the convenience of the legislature and the courts and practicing lawyers we call attention to the fact that we annexed to our 27th report, in 1951, an alphabetical, and chronological, index to the contents of these reports since 1919, with an introductory statement, and also an index of the circular letters of the Administrative Committee of the District Courts.

Preceding the index is an annotated list of about 150 statutes passed on recommendation of the Judicature Commission and of the Judicial Council since 1919, with references to the reports where the reasons for each statute may be found.

In view of the current proposals for shortening legislative sessions by eliminating waste motion, the index and list of statutes should prove helpful to members of the legislature and its committees as it will show where the subject matter of many bills, have been discussed by the Judicial Council and reasons stated why they should, or should not, be enacted. References to such discussions may save time at committee hearings.

The Commonwealth of Massachusetts

DECEMBER, 1953.

To HIS EXCELLENCY, CHRISTIAN A. HERTER
Governor of Massachusetts

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.) we have the honor to transmit the twenty-ninth annual report of the Judicial Council for the year 1953.

FRANK J. DONAHUE, *Chairman,*
FREDERIC J. MULDOON, *Vice-Chairman,*
LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
DAVIS B KENISTON,
FRANK L. RILEY,
CHARLES W. BARTLETT,
JOSEPH GOLDBERG,
FREDERICK M. DEARBORN, JR.

ACTS OF 1924, CHAPTER 244

As amended by St. 1927, c. 923, St. 1930, c. 142, and St. 1947, c. 601
Now appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections—*Section 34A*. There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The Judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of five thousand dollars.

MEMBERS OF THE COUNCIL

FRANK J. DONAHUE of Boston, *Chairman*
FREDERIC J. MULDOON of Winthrop

LOUIS S. COX of Lawrence
JOHN E. FENTON of Lawrence
JOHN C. LEGGAT of Lowell
DAVIS B. KENISTON of Boston
FRANK L. RILEY of Worcester
CHARLES W. BARTLETT of Dedham
JOSEPH GOLDBERG of Hudson
FREDERICK M. DEARBORN, JR. of Wenham

FRANK W. GRINELL, *Secretary*, 60 State St., Boston

TWENTY-NINTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

To His Excellency

CHRISTIAN A. HERTER

Governor of Massachusetts

The Judicial Council was created by St. 1924, Chapter 244 (*See copy printed on opposite page*), "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by that system and its various parts."

Since the last report the term of Edward O. Proctor expired and Frederick M. Dearborn, Jr., of Wenham was appointed by Your Excellency as a member of the Council for a four year term.

RECOMMENDATIONS ADOPTED IN 1953

During the last session the legislature adopted, either verbatim, or in substance, the following recommendations of the Council in our 28th report.

Chapter 61 as to consent required to adoption (see 28th report 37).

Chapter 169 relative to Defences in Actions for False Arrest or Imprisonment (see 28th report, p. 22).

Chapter 242 Relative to the Admissibility in Evidence of Certain Written Statements (see 28th report, p. 71).

Chapter 333 Relative to the Granting of Administration to public Administrators (see 28th report, p. 35).

Chapter 384 Relative to the Filing of Exceptions in Criminal Cases (see 28th report, p. 70).

Chapter 579 as to Registration of Motor Vehicles or Trailors owned by a Minor (see 28th report p. 27.)

Chapter 586 Relative to Practice in Petitions for Certiorari and Mandamus (see 28th report, pp. 68-69).

Chapter 632, as to a fee for injunctions (see 28th report p. 70).

Most of the negative recommendations on bills referred to us were followed. The action of the legislature on certain matters recommended is explained later in this report.

Reports Requested by the Legislature in 1953

This year the subject matter of the following 10 bills was referred to the Council with a request for a report.

Senate 287, House 1450, House 1018 and House 1946 all relating to enforcement of the support of dependents (referred by resolves, chapter 5).

House 1527 relative to limiting the time for recovery of legacies (referred by resolves, chapter 19).

House 1011 relative to an administrator for the courts and an annual conference of judges (referred by resolves, chapter 20).

Senate 278 relative to the use of a telephone to place or register bets (referred by resolves, chapter 22).

House 1370, section 2, relative to protection of civil rights (referred by resolves, chapter 23).

House Chapter 1056 relative to appointment of guardians of insane persons (referred by resolves, chapter 29).

House 2377 relative to restricting the power of the attorney general and of district attorneys to authorize wire-tapping (referred by resolves, chapter 32).

We discuss these matters in this report.

CONGESTION IN THE SUPERIOR COURT

This matter continues to be much discussed by the bar and throughout the press of the country. As we pointed out in our last report, it is not new. Within a few months after the creation of the Judicial Council at the end of 1924, the legislature adopted chapter 27 of the Resolves of 1925 as follows:

> "Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and among other things . . . ways and means for encouraging, so far as consistent with constitutional rights, trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925)."

The subject of congestion has been repeatedly discussed since then in the reports of the Judicial Council as well as in various legal periodicals and legislative committee reports. The most extended studies were in 1932 and 1933 and will be found in the 8th report 8-37 and 9th report 11-35 and

In connection with the suggestions during the past year that the congestion was worse than ever before and the jury trials were about 4 years behind in certain counties, we called attention to the statement of the Council in 1933 on p. 16 of its 9th report.

> "The Superior Court, in the counties which have the great bulk of litigation to carry, is nearly four years behind in its jury trial work."

During the war the accumulation of entries decreased from 27,620 in 1941 to 15,414 in 1944 and 16,722 in 1945. Since then it increased to 31,587 entries in 1952 and 33,060 in 1953. (See p. 84.)

Our 28th report which was pending before the 1953 session of the legislature contained an extended report on the state of the dockets as shown by the annual returns of the clerks of court since 1924 and also contained certain recommendations which, in substance, have been made repeatedly by the Council and other committees or commissions during the past 25 years or so.

The Council said (at p. 10):

"The question arises whether the public in attempting to provide theoretical opportunities for obtaining justice is not in fact providing excessively dilatory machinery which defeats its own purpose at an enormous expense to the public.

"The biggest fact that stands out from the figures is that congestion will never be cured, if large classes of cases are to remain in the courts as we believe they should remain, *until the congestion is attacked at its sources.* The Council has made a considerable number of suggestions for this purpose in the past twenty years or earlier, but most of them have been opposed by lawyers."

Reference was made (with a substantial quotation) to Judge Cox's article in B. U. Law Rev. for April 1931. The Council then continued (at pp. 13-14),

"As stated in the 4th report of the council (pp. 24-25), a jury fee was required in Massachusetts from 1805 to 1836.

"By s. 1 of Chapter 63 of the Acts of 1805 (January session, Chapter 37)—an act to increase the fees for grand and petit jurors and witnesses—it was provided that the fees for jurors should be one dollar and twenty-five cents for attendance, and four cents a mile for their travel out and home—'and there shall be paid to the Clerks of said Courts respectively, by the plaintiff or appellant the sum of Seven Dollars for the trial of each civil action, for the use of the County'. A jury of twelve men in 1805 received $15.00 a day for attendance so that the plaintiff by paying $7.00 trial fee paid nearly half the expense of the jury. Today the expense each day for a jury of twelve men who sit on a case is $96 for the jurors only, not to speak of the additional jurors in attendance or the salaries of judge, court officers and other overhead cost.

"In the 10th report (p. 10) the Council pointed out that with the growth of modern business and of expanding problems, the

developments in our legal structure have been, from necessity, to develop the courts at the bottom of the legal pyramid to handle the business for which they are adapted and equipped without exorbitant public cost."

The Council then renewed the recommendation (1st) for a jury fee of $15 and (2nd) for the experiment in the Superior Court of oral depositions of parties before trial (for reasons explained on p. 14) and continued

"We recommend these two proposals of a jury fee and deposition of *parties* (before trial), as effective methods instead of refusing to recognize the causes and attacking and reducing congestion. Nothing ever advances without experiment. These experiments are not new. They have worked elsewhere. If we try them we shall learn something.*

"Both proposals have been opposed by many (not all) lawyers engaged in tort cases, but as tort business, especially that involving motor vehicle cases, is, perhaps, in the greatest danger of being lifted out of the courts, unless conditions are improved, we suggest that those who oppose the experiments reconsider the matter. We believe the proposals to be in the interest of the lawyers, of their clients and of the public."

The result of this report in the 1953 legislature was that for the *first time* two committees—Judiciary and Counties—approved a jury fee bill (House 2524) for a $10.00 fee, but it did not pass the House.

We believe that a reasonable jury fee of $15.00 would reduce the number of claims for the form of trial most productive of delay and congestion and most expensive to the public by attacking congestion at its source. We shall never find out until we try. We recommend the following:

DRAFT ACT No. 1

"Section 1. Section 4 of chapter 262 of the General Laws, as most recently amended by section 2 of chapter 119 of the acts of 1950, is hereby further amended by inserting after the fourteenth paragraph, the following paragraph:

"For filing a claim for jury trial or a motion to frame issues in the superior court for jury trial or for the entry in the superior court of such issues framed by the land court or by a probate court, and transmitted to the superior court, for trial, fifteen dollars.

"Section 2. This act shall take effect on September first in the current year."

* A carefully prepared article by Alan J. Dimond on the history of the matter since the creation of the Court in 1859 will be found in the Mass. Law "Quarterly" for June 1953.

RE-ENACTMENT OF CHAPTER 387 OF THE ACTS OF 1934—THE SO-CALLED "FIELDING ACT".

In viewing the figures as to congestion in 1932 and 1933 the legislature tried the experiment of chap. 387 of the acts of 1934 providing that

> "District Courts shall have exclusive original jurisdiction of actions of tort arising out of the operation of a motor vehicle."

The act contained a right to remove the case to the superior court for trial. The act was in operation about nine years before its repeal by Chap. 296 of 1943.

In the 28th report (1952) the Council called attention to these facts with the tabulated figures as to entries and removals and to the fact that a majority of the Council in its 18th report (1942) had recommended the repeal of the act on the ground that it had failed of its purpose as 40% of the cases were removed. A minority of the Council, however, then believed

> "that in spite of the fact that about 40% of the motor vehicle cases entered in the district courts are removed for trial to the Superior Court, the act has succeeded in sifting the large volume of entries so that a large number of cases involving relatively small amounts have remained in the district courts where the work of disposing of them takes less time at a smaller cost than it would in the Superior Court."

The present majority of the Council, however (Judge Donahue dissenting for the reason stated on p. 72 of the 28th report) was, and still is, of the opinion that it was a mistake to repeal the act and that the figures indicate the very strong probability that if the act of 1934 had not been repealed, it would, in spite of a large percentage of removals, have continued to sift a large number of cases involving relatively small amounts and kept them in the District Courts "where the work of disposing of them takes less time at smaller cost than in the Superior Court. It appears probable that about 5,000 motor vehicle cases a year would have stayed in the District Courts under that act thus reducing the load of cases in the Superior Court."

The question naturally arises—why not re-enact the act of 1934? A majority of the Council think the present congested conditions call for its re-enactment in the public interest and, therefore, recommend it.

DRAFT ACT No. 2

Re-enact chapter 387 of the acts of 1934. As the act is in print in the statute book of 1934 it is not reprinted here but is incorporated herein by reference.

ORAL DEPOSITIONS OF PARTIES BEFORE TRIAL

The bill for oral depositions before trial was reported favorably by the Judiciary Committee as H. 2609, passed the House and was then rejected in the Senate. The bill appears on pages 20-21 of the 28th report. It applies to parties only.

We believe this bill to be one method of reducing congestion for reasons stated in the 28th report, and as more than one experiment will be needed to reduce congestion this method of getting at the facts more promptly than is now possible, we think should be adopted as well as a jury fee. It is not a new one. It has been in effective use elsewhere for many years and was recommended in even broader form by the Judicature Commission in its second report in 1920 (see M.L.Q. January, 1921 for report). We recommend the following:

DRAFT ACT No. 3

Discovery by Deposition of Parties

Chapter 231 of the General Laws is hereby amended by inserting after Section 68 the following Section 68A:

SUB-SECTION 1. Any party in the Superior Court, after the entry of a writ or the filing of a bill or petition may examine orally any other party, in the city of town within the commonwealth of the residence or usual place of business of the party to be examined, for the discovery of facts and documents admissible in evidence at the trial of the case. The word "party" in this act shall be deemed to include parties intervening or otherwise admitted after the beginning of a suit. Such examination may be used at the trial by the party taking the same or by any other party on paying the cost of taking the same unless the party examined is present at the trial of the case. Nothing herein shall be held to prevent the use of such examination as a declaration or admission of a party, if material, whether or not the party examined is present at the trial, or the use of such examination in connection with cross-examination of such party. Sections sixty-five, sixty-six and sixty-seven of chapter two hundred and thirty-one of the General Laws shall apply under this act.

SUB-SECTION 2. In order to make such examination any party may apply to a justice of the peace or notary public, who shall issue a notice to the party to be examined and all other parties to appear before said justice or notary at the time and place appointed for such examination. An attested copy of such notice shall be sent by registered mail to the party to be examined and to all attorneys of record of said party and of all other parties, not less than ten days before the date set for the examination so that they may attend.

SUB-SECTION 3. The party examined shall be sworn or affirmed, and his examination shall be taken in the same manner and subject to the same rules

as if taken before a court. The court shall at all times have full control of the examination and may impose reasonable conditions as to its conduct and scope.

SUB-SECTION 4. The party requesting the examination shall be allowed first to examine on all points material to the cause in which the examination is made. The party examined or his attorney may then examine in like manner, after which any party may examine further.

SUB-SECTION 5. The examination shall be taken by a stenographer appointed by the justice or notary on the request of either party at his expense. Said stenographer shall be sworn by the justice or notary to transcribe faithfully the testimony, and his transcript shall be certified by the justice or notary. In case such request is not made the deposition shall be written by the justice, notary or commissioner or by a disinterested person, in the presence and under the direction of the justice, notary or commissioner. The examination or the stenographer's transcript thereof shall be carefully read to or by the party examined and then subscribed by him.

SUB-SECTION 6. The examination shall be delivered by the justice, notary or commissioner to the court, before which the cause is pending, or shall be enclosed and sealed by him and directed to it, and shall remain sealed until opened by it. Copies of the deposition, however, may be furnished by the justice, notary or commissioner to any party.

SUB-SECTION 7. Nothing in this act contained shall prevent either party calling and examining verbally at the trial of the action any party in the same manner as though his testimony had not been taken in writing.

SUB-SECTION 8. If a party after due notice fails without reasonable cause to attend and submit himself to examination under this act, the court may make and enter such order, judgment or decree as justice requires.

SUB-SECTION 9. No one without leave of court shall both examine any other party orally under this act and interrogate him in writing under General Laws, chapter two hundred and thirty-one, sections sixty-one to sixty-seven, and no party shall be required to attend and submit himself to examination more than once in the same case except by order of court.

VENUE IN DISTRICT COURTS

As stated in our 27th report (pp. 34-35) and again in the 28th report we think another way to check congestion in the Superior Court is to open the area of jurisdiction of the district courts. We see no reason why cases of contract and all tort cases should not be in the same class with motor vehicle torts for this purpose. Accordingly, for the reasons stated in the report referred to above, we recommend that Section 2 of C. 223 be amended to accomplish this result by the following—

DRAFT ACT No. 4

(New words printed in italics)

Section 2 of chapter 223 of the General Laws as most recently amended by section 2 of chapter 296 of the Acts of 1943 is hereby further amended by inserting after the word "ninety" in the second sentence of said section 2 as amended, the words "or any action of tort or of contract" so that said sentence will read as follows:

"An action of tort arising out of the ownership, operation, maintenance, control or use of a motor vehicle or trailer as defined in section one of chapter ninety *or any action of tort or of contract* may be brought in a district court within the judicial district of which one of the parties lives or in any district court the judicial district of which adjoins and is in the same county as the judicial district in which the defendant lives or has his usual place of business; provided, that if one of the parties to any such action lives in Suffolk County such action may be brought in the municipal court of the city of Boston."

CONCURRENT JURISDICTION

To avoid existing confusion and waste of the time of the legislature and of the Supreme Judicial Court as a result of inadvertence in legislative drafting *in future*, for the reasons stated in our 28th report (pp. 50-51) we again recommend an amendment to Chapter 4 of the General Laws by the following:

DRAFT ACT

Chapter 4 of the General Laws is hereby amended by inserting at the end of Section 7 the following new clause.

Supreme Judicial Court—When to have Concurrent Jurisdiction—Words conferring original jurisdiction or jurisdiction of appeals from an administrative board or officer on the Supreme Judicial Court shall be held to mean concurrent jurisdiction with the Superior Court unless it is expressly provided that such jurisdiction of the Supreme Judicial Court is to be exclusive.

PROCEDURE FOR ATTACHMENT OF WAGES

In our report for 1951, pp. 13-15, at the request of the legislature (and again in our 28th report p. 216) we recommended an act to clarify the procedure under chapter 558 of the acts of 1950 because of the variation of practice of judges as to the interpretation of the act, resulting not only in unnecessary waste of time and expense of both the parties and the courts, but also in an indefinite number of probably illegal attachments which are not known to be illegal. As the bill recommended was not adopted, the law was left in a condition which should not be allowed to continue as it causes confusion and waste action.

We see no reason why such a possibility of injustice to the wage earner or his creditor or both should be allowed to continue, and we again recommend the following:

DRAFT ACT

AN ACT FURTHER REGULATING THE ATTACHMENT ON WAGES FOR PERSONAL LABOR AND SERVICES

Section 32 of chapter 246 of the General Laws is hereby amended by striking out paragraph Eighth, as amended by chapter 558 of the acts of 1950, and inserting in place thereof the following:—

Eighth, By reason of money or credits due for the wages of personal labor or services of the defendant, unless such attachment is authorized in advance by written permission endorsed upon the writ and signed by a justice, associate justice or special justice of the court in which the action is commenced and application to said justice, associate justice or special justice of the court for permission for said attachment shall be made only after five days' written notice has been delivered or sent by mail, postage prepaid, to the defendant at his last known address, place of business or employment. Such notice shall contain the name of the plaintiff, the name of the court in which the action is to be commenced, the nature of the claim, the time and place such application will be made, and shall inform the defendant that he is entitled to be present and be heard at said time and place if he objects to the granting of said application. A copy of said notice and a certificate of the person sending or delivering said notice shall be evidence thereof. Notwithstanding the preceding provisions relating to notice, if the said justice, associate justice or special justice finds in his discretion that compliance with said provisions relating to notice will unreasonably delay and hinder justice he may authorize the attachment with a shorter notice, or without notice, to the defendant.

The last sentence of this draft (as explained in the 27th report pp. 14-15) is to "provide for unusual cases where the defendant has left his employment and has left the Commonwealth with no known address or under other circumstances making the notice above specified impracticable but has wages due him from an employer in the Commonwealth."

While the law should be changed even without the last sentence, the sentence if adopted would be in the interest of justice where a man is running away from his debt.

H. 1527 TO PLACE A LIMITATION ON ACTIONS FOR LEGACIES

(Referred by Resolves Chapter 19)

Section 19 of Chapter 197 of the General Laws provides that:

"Actions to Recover Legacies.—A legatee may recover his legacy and enforce all rights in respect to the same by proceedings in equity in the probate court

in which the will was proved. Nothing in the chapter shall be construed to limit the time within which such proceedings may be brought. No action at law shall be brought against the estate of the testator for such recovery."

H. 1527 would change this section as follows:

Section 19 of chapter 197 of the General Laws is hereby amended by striking out the second sentence thereof and substituting therefor the following:—No action in equity in the probate court, no action on the bond and no other proceeding for the recovery of such legacy shall be commenced after twenty years from the date of the testator's death or from the expiration of a life estate, if said legacy is subject to such life estate, except that a legatee under a will of a testator dying prior to March fifteenth, nineteen hundred and thirty-six, or a legatee whose legacy is subject to a life estate, the holder of which said life estate died prior to March fifteenth, nineteen hundred and thirty-six, shall have until March fifteenth, nineteen hundred and fifty-six, in which to bring said action,—so that said section shall read as follows:—*Actions to recover Legacies.* A legatee may recover his legacy and enforce all rights in respect to the same by proceedings in equity in the probate court in which the will was proved. No action in equity in the probate court, no action on the bond, and no other proceeding for the recovery of such legacy shall he commenced after twenty years from the date of the testator's death or from the expiration of a life estate, if said legacy is subject to such life estate, except that a legatee under a will of a testator dying prior to March fifteenth, nineteen hundred and thirty-six, or a legatee whose legacy is subject to a life estate, the holder of which said life estate died prior to March fifteenth, nineteen hundred and thirty-six, shall have until March fifteenth, nineteen hundred and fifty-six, in which to bring said action. No action at law shall be brought against the estate of the testator for such recovery.

We do not recommend the bill in its present form, but we think the purpose of the bill so far as it affects the real estate of the deceased should be carried out.

Indefinite liability for payment of legacies without any limitation as to the time, may seriously affect the marketable title to land long after the usual period for the settlement of the estate of a deceased person. It is in the public interest, not only of land owners but of the public generally, that titles should be marketable and that there should be reasonable time limits within which claims may be litigated. The general policy is illustrated by the statutes of limitations for actions of tort—2 years; for ordinary debts, 6 years; for actions on sealed instruments and witnessed notes 20 years; and for most claims against the estates of deceased persons, a shorter period of 1 year from the date of the approval of the bond of the representative of the estate.

Legacies, as shown by the present Section 19 above quoted, are specially favored. By Section 1 of Chapter 202 the liability of land which descends to heirs exists only if the personal estate is insufficient, but it has no time limit. Most legacies, of course, are known and paid, but sometimes the legatees do not know of the existence of a legacy. Our first recommendation relates to notice. The 21st report of the Judicial Council in 1945 contained the following (see p. 53).

"It has come to our attention that in some cases the beneficiary of a charitable bequest under a will has not received notice of the bequest except by accident a considerable period of time after the allowance of the will. In Maine there is a statute (Revised Statutes of Maine 1930, c. 75, ss. 25, p. 1160) which provides that the register of probate within thirty days after the allowance of the will shall notify by mail all beneficiaries under the will that bequests have been made to them stating the name of the testator and executor or administrator with the will annexed and that the beneficiaries may obtain copies of so much of the will as relates to them on payment of a fee of fifty cents or more if the passage is more than ten lines. We assume that it is the common practice of an executor to notify, within a reasonable time, persons named as beneficiaries, but we think that it should be made his specific duty to do so. We see no reason why this burden should be placed upon the registers of probate at the public expense. We think it should be a natural function of the executor in administering the estate." Accordingly, we recommended and now renew the following:

DRAFT ACT No. 1

"Within three months after the allowance of a will and the appointment and qualifications of an executor, it shall be the duty of the executor to notify by mail the devisees and legatees named in the will whose addresses are known to him that devises, legacies or bequests have been made to them and to file in the Probate Court an affidavit showing the names of those notified and the addresses to which notices were mailed. In case an administrator with the will annexed is appointed he shall have the same duty unless it has already been performed by an executor."

This recommendation will, we believe, reduce the uncertainties which now cloud land titles, but it will not eliminate some of them and we see no reason why legatees, so far as their claims against land are concerned, should not be barred to the same extent that heirs are barred by lapse of time. As is commonly known, even to laymen, unless disposed of by will, the title to land of a deceased person descends to his *heirs* immediately upon his death. But, if

they do not claim the land and it is occupied and claimed by someone else for 20 years, the heirs lose their title by adverse possession, whether they knew they had a title by descent or not. For these reasons we recommend the following

DRAFT ACT No. 2

Section 19 of Chapter 197 of the General Laws is hereby amended by adding at the end of the second sentence the words

"Except that the real estate of the testator shall not be liable to be sold for the payment of a legacy by the executor or other representative of the estate either under a power in the will or under license or order of court in, or as a result of, such a proceeding unless it is filed in the probate court within twenty years from the testator's death, or if the testator died prior to December 31, 1935, then within the period ending December 31, 1955."

RECIPROCAL INTERSTATE PROCEDURE FOR ENFORCEMENT OF SUPPORT

S. 287, H. 1450, H. 1018, ALL PROPOSING AMENDMENTS TO G. L. CHAPTER 273A KNOWN AS THE "UNIFORM ENFORCEMENT OF SUPPORT ACT".

(Referred by Resolves Chapter 5)

A bill for such procedure (Senate 264 of 1948) was referred to the Council in 1948 with a request for a report. The matter was briefly discussed in the 25th report in 1949 (pp. 38-39) as follows:

"Reciprocal statutes have been passed in Maine, New Hampshire, Connecticut and New York during the past year. Meanwhile a 'model' act is in the course of preparation by the National Conference of Commissioners on Uniform State Laws.*

"Senate 264, referred to the Council, differs from the acts of other states above referred to. After a study of its provisions, we are of opinion, for a variety of reasons, that it is not in form for passage here and, as the recent acts in other states are experiments and in view of the fact that a 'model' act is in preparation by the Uniform Laws Commissioners, we think it wiser for Massachusetts to await the appearance of the 'model' act before attempting to draft legislation here. Accordingly, we do not recommend Senate 264."

In 1951 the "model" act of the National Conference was presented to the legislature and was enacted (without reference to the Council) as Chapter 273A which is now before the Council again as a result of the request for a report on the three bills listed above.

Chapter 273A places the whole matter in the hands of the Probate Court. Problems in administering the act have developed in those

courts. The purpose of the three bills referred to us is to shift the jurisdiction from the Probate Courts to the District Courts which now do most of the non-support work within the Commonwealth on the criminal side of the court and which have probation officers to assist in the work, as is not the case with the Probate Courts.

In July of this year a conference on the question of social welfare and non support was held in New York City sponsored by the Council of State Governments, the Regional Continuing Committee on Social Welfare and the New York State Joint Legislative Committee on Interstate Cooperation. The primary topic was the Uniform Support of Dependents Act.

A representative of the Administrative Committee of the Probate Courts, attended the Conference and we have been assisted by his report.

While these reciprocal procedure acts are of relatively recent origin their effectiveness in other states in meeting economic conditions, has resulted in the enactment of substantially similar laws in most of the states with the support of the welfare departments. It was reported at the Conference in New York, referred to, that New York last year saved in welfare aid over $250,000. directly as a result of these reciprocal acts and that, probably, other large sums may have been saved indirectly. This information illustrates the practical importance of such acts. The problems relate to procedural details.

In connection with suggestions for interstate uniformity of details in court procedure, the Judicial Council in its first report in 1925 (p. 35) and its third report in 1927 (pp. 65-66) said:

> "Court procedure seems to us peculiarly one for local experiment in convenience and effectiveness". (See also Prof. Sunderland in Harvard Law Review, April 1926, 744-745.)

The present Council is of the same opinion.

In interstate reciprocal procedure as recognized in the second paragraph of Section 1 of Chapter 273A (the "uniform" act) the important object is "substantial" uniformity of purpose rather than of detail. We have now tried the experiment of the "uniform" act in the Probate Courts for two years and it has not proved as "convenient and effective" in practice as we think it can and should be. We think the purpose of transferring the jurisdiction to the District Courts, as suggested in the three bills referred, should be carried out.

Of the three bills referred, House 1450 seems best adapted to this purpose if it is supplemented by certain changes. The most impor-

tant change which we recommend is the addition of a section authorizing the Administrative Committee of the District Courts and the justices of the Municipal Court of the City of Boston (which is also a "district" court) to formulate and promulgate uniform rules of practice and procedure, as to details not inconsistent with Chapter 273A, in the light of experience in order to make the chapter work.

Section 13 of House 1450 would make the entry fee $2. instead of $4. now provided in Chapter 273A. We do not agree. The clerical work involved in this reciprocal procedure will be substantially more than that in the usual district court litigation. We think the fee should stay at $4., or perhaps better, be increased to $5.

We have inserted the substance of House 1450 into a revised chapter 273A with the additions which we suggest and recommend, all the changes being printed in italics.

Another bill (Senate 283) was filed in the 1953 session by one of the Massachusetts Commissioners on Uniform State Laws containing proposed amendments of Chapter 273A proposed by the Commissioners. While this bill was not specifically referred to the Council, it is necessarily involved in the "subject matter" of Chapter 273A which is before us by the reference of the other bills. We have incorporated some of the provisions of Senate 283 in the act which we recommend. Some of the other provisions should, in our opinion, not be adopted and some relate to details which should be governed by rules rather than statutory provisions. All of the provisions incorporated from Senate 283 are printed in italics in our draft of a revised chapter.

We recommend the following draft act and respectfully suggest that an early effective date be inserted, allowing a reasonable time for the formulation of any rules which may be deemed expedient by the rule making body therein specified before the act takes effect in the District Courts.

Sections 8 and 9 of Chapter 273A now provide that "an authenticated copy" of the chapter be transmitted, by, or to another state with each case initiated. This seems to us an unnecessary and expensive nuisance for impecunious petitioners. Accordingly we have omitted it from the amended draft below. Massachusetts courts, and those of many other states, have by statute "judicial notice" of the statutes of other states, and, for a court of any state in which such laws are not within judicial notice, a request for a copy would, of course, be complied with.*

DRAFT ACT

Section 1. Chapter 273A of the General Laws inserted by Chapter 657 of the acts of 1951 is hereby amended by striking out the same and inserting in place thereof the following:

Chapter 273A

Uniform Reciprocal Enforcement of Support

Section 1. In this chapter unless otherwise expressly provided or the context otherwise requires, the following words and phrases shall have the following meanings:—

"Court", a district court of this commonwealth and, when the context requires, the court of any other state as defined in a reciprocal law substantially similar to this chapter.

"Duty of support", any duty of support imposed by law, or by any court order, decree or judgment, whether interlocutory or final, whether incident to a proceeding for divorce, legal separation, separate support, or otherwise.

"Initiating state", a state in which a proceeding pursuant to the provisions of this chapter or a reciprocal law substantially similar to this chapter is commenced.

"Obligee", any person to whom a duty of support is owed.

"Obligor", any person owing a duty of support.

"Responding state", a state in which a proceeding pursuant to the proceeding in the initiating state is or may be commenced. *"State", includes any state, territory or possession of the United States* and the *District of Columbia in which this or a substantially similar reciprocal law has been enacted.*

Section 2. The remedies provided in this chapter are in addition to and not in substitution for any other remedy.

Section 3. The duty of support imposed by the laws of the commonwealth or by the laws of the state where the obligee was present when the failure to support commenced as providing in section four, and the laws relative to the enforcement thereof, bind the obligor regardless of the presence or residence of the obligee.

Section 4. Duties of support enforceable under this chapter are those imposed under the laws of any state in which the alleged obligor was present during the period for which support is sought or in which the obligee was present when the failure to support commenced.

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* The Council of State Governments, which was active in stimulating the passage of these reciprocal laws (now in force in 46 states and Alaska, Hawaii, Puerto Rico and the Virgin Islands) has issued a Manual of reciprocal state legislation with forms and other information on the various states. Senate 283 proposed that the Attorney General be designated, "as the state information agency," but, in Massachusetts the Administrative Committee of the District Court is the fountain of information as to those courts and would be the natural information agency without any statutory provision about it. Their semi-annual circular letters to all the district court justices, clerks and probation officers would be a natural medium of information about the law for 72 of the courts and the Municipal Court of the City of Boston would, of course, keep itself informed.

Section 5. Whenever any state or a political division thereof has furnished support to an obligee it shall have the same right to commence proceedings under this chapter as the obligee to whom the support was furnished, so that it may secure reimbursement for expenditures so made *and to obtain continuing support.*

Section 6. The duty of support shall be enforceable by petition filed in *a district* court, irrespective of the relationship between the obligor and the obligee. Any proceeding hereunder shall be commenced in a *district* court *within whose jurisdiction* the obligee is an inhabitant or a resident.

Section 7. The petition shall be verified and state the name and, so far as known to the petitioner, the address and circumstances of the respondent, and the dependents for whom the duty of support is sought to be enforced, and all other pertinent information.

Section 8. If the court finds that the petition sets forth facts from which it may be determined that the respondent owes a duty of support, and that a court of a responding state may obtain jurisdiction of the respondent or his property, it shall so certify, and shall cause certified copies of the petition, *and* the certificate to be transmitted to the court of the responding state.

Section 9. When the court receives from the court of an initiating state certified copies of the pleading similar to a petition under section six, by whatever name known, and the certificate, it shall take such action as is necessary in accordance with the laws to obtain jurisdiction of the respondent, shall docket the cause, notify the district attorney of the district in which the respondent is living or found, and mark the matter for a hearing.

Section 10. *When this commonwealth is* a responding state, *and the court* finds a duty of support, it may order the respondent to furnish support or reimbursement therefor, and subject the property of the respondent to such order.

Section 11. The court shall cause to be transmitted to the court of an initiating state a copy of all orders for support or for reimbursement therefor.

Section 12. In addition to the foregoing powers, the court, when the commonwealth is a responding state, may subject the respondent to such terms and conditions as it deems proper to assure compliance with its orders and in particular

(*a*) to require the respondent to make payments at specified intervals to; *a probation officer assigned* by *the court.*

(*b*) to punish a respondent who shall violate any order of the court to the same extent as is provided by law for contempt in any other suit or proceeding.

Section 13. When, in proceedings under this chapter, the commonwealth is acting as a responding state, and the *probation officer* shall receive payments from a respondent, pursuant to an order of the court or otherwise, he shall forthwith transmit the same to the court of the initiating state, and upon

request of said court shall furnish a certified statement of all payments made by the resonlent.

Section 14. The *probation officer assigned by the court* shall, in proceedings in which the commonwealth is an initiating state, receive and disburse forthwith all payments made by the respondent or transmitted by the court of the responding state.

Section 15. If any part, section or subdivision of this chapter or the application thereof to any particular person, persons or conditions is held invalid, unconstitutional or inoperative, the remainder hereof, or the application of any such part, section or subdivision to other persons and conditions, shall not be affected thereby.

Section 16. This chapter may be cited as the Uniform *Reciprocal* Enforcement of Support Act, and shall be so construed and interpreted as to accomplish its general purpose to make substantially uniform the laws of states enacting like law.

Section 17. This chapter shall be interpreted to require the petitioner to pay in the first instance the cost of bringing the respondent before the court by paying the entry fee on the petition, or other pleading, by which the court of this commonwealth, as a responding state, takes action to bring the respondent before the court and shall further pay whatever sum may be deemed necessary by the court to cover the expense of service of the citation upon the respondent. The court may, after hearing, order the respondent to reimburse the petitioner for the costs so incurred. If the petitioner is without counsel in this commonwealth, the court may, on its own motion, appoint local counsel to represent the petitioner and may fix the fee of such counsel and cause the same to be included in the taxation of costs.

Section 2. Section 6 of Chapter 215 of the General Laws is hereby amended by striking out the sentence inserted by Section 2 of Chapter 657 of the acts of 1951 and Section 19 of Chapter 218 of the General Laws as amended by the Chapter 296 of the acts of 1943 is hereby further amended by adding at the end thereof the sentence "District Courts shall also have jurisdiction of civil proceedings under Chapter two hundred and seventy-three A."

Section 3. Section 20 of chapter 233 of the General Laws, is hereby amended by striking out the second paragraph and inserting in place thereof the following paragraph:—

First, except in a proceeding under chapter two hundred and seventy-three A and in a prosecution begun under sections one to ten, inclusive, of chapter two hundred and seventy-three, neither husband nor wife shall testify as to private conversation with the other.

Section 4. Section 40 of Chapter 262 of the General Laws is hereby amended by striking out the words inserted by Section 4 of Chapter 657 of the Acts of 1951. Section 2 of said Section 40 as amended by Section 1 of Chapter 119 of the Acts of 1950, is amended by inserting after the third paragraph thereof a new paragraph as follows:

"For the entry of a petition under Chapter 273A four dollars".

Section 5. The Administrative Committee of the District Courts may make rules applicable to all district courts except the Municipal Court of the City of Boston, and the justices of that court or a majority of them may make rules applicable to that court, in regard to the accounting by probation officers of moneys received and paid by them under this act and in regard to any other matters, not inconsistent with this act, to make the administration of this act more convenient and effective for its purpose.

Section 6. Transfer of Pending Cases. All petitions and matters incidental thereto in cases in which the Commonwealth is the initiating state, pending on the effective date of this act before a probate court, shall be transferred to the district court of the district of which the obligee is an inhabitant or a resident for further disposition in accordance with the law and all petitions and matters incidental thereto in cases in which the Commonwealth is the responding state, pending on the effective date of this act before a probate court shall be transferred to the district court of the district of which the obligor is, or is alleged in the petition, or has been found by the court, to be an inhabitant or a resident for further disposition in accordance with the law.

All petitions and matters incidental thereto which have been heard by, or argued before, a probate court and upon which no decisions have been made before the effective date of this act shall remain within the jurisdiction of said probate court for the purpose of and until such decision and, thereafter and upon such decision, shall be transferred to the proper district court, as heretofore provided, for further proceedings in accordance with law.

Section 7. Appellate Proceedings. Any party in a proceeding under this chapter aggrieved by any ruling on a matter of law in any case pending and transferred hereunder or hereafter commenced, may as of right have the ruling reported for determination by the appellate division of the district court in which the proceeding is commenced, or to which it has been hereby transferred as provided for other cases, in district courts by sections 108, 109 and 110 of chapter 231 of the General Laws as heretofore amended and said sections and any appropriate rules made under this chapter shall govern such appellate proceedings.

Section 8. This act shall take effect on the ..... day of .....1954.

HOUSE 1946 AS TO ENFORCEMENT OF ORDERS AND DECREES OF COURTS OF OTHER STATES FOR SUPPORT OF DEPENDENTS

(Referred by Resolves Chapter 5)

This bill provides

Section 5 of chapter 273 of the General Laws is hereby amended by inserting after said section the following section:—

Section 5B. Any person now residing in the commonwealth, who is under order or decree of a court of another state to support a wife or dependent

child or children, and who violates the terms of said order or decree, may be tried in the courts of this commonwealth upon the original charge, and the original disposition may be invoked.

We do not recommend this bill.

It is proposed as an amendment to Chapter 273—otherwise commonly known as the "uniform desertion act". It provides for a criminal proceeding, but the criminal laws of another State are not enforceable in Massachusetts (See Com. v. Lanque, 326 Mass. 559, at p. 561, Comm. v. Booth, 266 Mass. 80). Liability for support has both criminal and civil aspects. (See Com. v. Dornes, 239 Mass. 592 at p. 584.) Chapter 273A discussed above now provides for a reciprocal civil proceeding to enforce here "any duty of support imposed by law, or by any court order, decree judgment, whether interlocutory or final whether incident to a proceeding for divorce, legal separation, separate support or otherwise." If our recommendations are adopted the jurisdiction of such civil proceeding will be in the district courts. Chapter 273A now, or if amended, seems to cover the purpose of House 1496.

RELATING TO THE RIGHT OF PRIVACY ON SECTION 2 OF H. 1370

(Referred by Resolves, Chapter 23)

The one section, the subject matter of which is thus referred, reads

Section 2 of H. 1370

Section 2. Any person whose name, portrait or picture is used within this commonwealth for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the superior court of this commonwealth against the persons, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. But nothing contained in this act shall be construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed, and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which

he has sold or disposed of with such name, portrait or picture used in connection therewith.

This relates to the question still unsettled in Massachusetts whether a common law "right of privacy" exists in this commonwealth without statutory provision. About 1891 a pioneer article by S. D. Warren and Louis D. Brandeis (later justice of the Supreme Court of the U. S.) tracing the history of the judicial opinions in England and in America during the previous century or two and suggesting that there was a common law right of privacy, appeared in 4 Har. Law Rev. Since that article appeared the right has been recognized in many opinions in other states, but the question is still undecided in Massachusetts, as shown by the opinions in *Themo* v. *New England Newspaper Publishing Co.* 306 Mass. 54 and *Kelley* v. *Post Publishing Co.*, 327 Mass. 275. In the latter case the court said (at p. 277):

". . . . the plaintiffs seek to raise the question whether there exists in the Commonwealth a legally protected right of privacy — a question left open in Themo v. New England Newspaper Publishing Co. 306 Mass. 54, 58. See Warren and Brandeis, 4 Har. L. Rev. 193; Restatement: Torts, s 867; notes in 138 A.L.R. 22, 168 A.L.R. 446, and 14 A.L.R. (2d) 750. For reasons that will appear praesently it is still unnecessary to decide that question. . . .

"Assuming for the purposes of this case that the plaintiffs have a right of privacy, we fail to see how it was impaired by what the defendant did. . . . But if the right asserted here were sustained, it would be difficult to fix its boundaries."

In the Restatement of Torts of the American Law Institute the weight of opinion of other courts on the subject is stated as follows (Vol. 4, s. 867):

"INTERFERENCE WITH PRIVACY

"A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

Dean Roscoe Pound recognized the existence of a right in 28 Har. Law Review in an article on "Interests in Personality" (pp. 343, 362 and 363). The notes in A.L.R. referred to in the passage quoted above from the opinion of the court, contain extended discussions of the cases and the subject is also discussed at length by Mr. Kacedan in 12 Boston University Law 353 and 600.

After discussing certain earlier Massachusetts opinions and especially that by Rugg C. J. in Baker v. Libbie, 210 Mass. 599.

Mr. Kacedan suggests (p. 393) that "it may be expected that when a proper case should arise the Supreme Judicial Court of Massachusetts will follow the trend of judicial decisions recognizing the right of privacy."

No case containing facts calling for a decision as to such recognition has yet appeared before the court but the weight of opinion already referred to and reflected in Sec. 687 of the "Restatement" above quoted together with the proposed Sec. 2 of the bill referred to us raises the question whether a right of privacy should be recognized by statute and if so in what manner, to what extent and with what remedy for its protection.

We think a right should be recognized but we do not recommend the Sec. 2 of H. 1370. That section appears to have been copied word for word from a New York "Civil Rights" statute (quoted by Mr. Kacedan in the note to pp. 626-627). As explained by him in a study of the New York law, the statute was passed as a result of popular and professional dissatisfaction with a majority opinion of the New York Court of Appeals denying the existence of a right of privacy from which Judge Gray vigorously dissented. The specifications in the statute did not cover the field of privacy and caused more litigation.

In the earlier thinking of courts of equity there appeared a persistent slogan that equity would protect only rights of property—a traditional idea which was finally abandoned by the Massachusetts Court in the leading opinion of Kenyon v. Chicopee 320 Mass. 528.

From the abundant and growing discussions of the subject during this century and from parts of the latest opinion in Kelley v. Post Pub. Co. above cited, the courts have been faced with the problems of the nature and definition of the right and the practical administrative difficulties in its protection.

A number of definitions have attempted but the simplest statement about it—intelligible to both laymen and lawyers appeared in a Kentucky case (Brentz v. Morgan 221, Kentucky, 765 at p. 768) quoted by Mr. Kacedan (p. 356) as follows:

> *"It has not been concretely defined and probably is not subject to a concrete definition* (italics ours) but it is generally recognized as the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned."

Most people would, we think, respond favorably to that statement, but such a right if it is to exist may have varied aspects

according to circumstances and cannot be reasonably confined to the "concrete" specifications of a statute.

As to the nature of the right it does not seem to be a "right of property" except by some form of fictional reasoning. Its nature seems more accurately described by Dean Pound's words as "a right of personality" and Mr. Kacedan characterizes it in his opening paragraph as part of the "right to life, liberty and the pursuit of happiness."

The great difficulty is to draw the line in the practical application of the right in the interests of justice without opening the floodgate of unwarranted litigation to clog the already overburdened court dockets.

It is not necessary to recognize it as a strictly "common law" right in a technical sense. Damages are not a controlling factor in the discussion. There may or may not be probable pecuniary damages. A suit at law for vague damages would be practically useless except for the purpose of annoyance. The substance of such a right is for immediate protection by prevention. It thus seems essentially an equitable right impossible of "concrete" definition for the purposes of a suit at law with its procedural limitations and liability to abuse, but readily capable of consideration and protection in the light of all the varying surrounding circumstances by a court of equity.

As pointed out elsewhere in this report the Supreme Court of the United States said, "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conceptions of policy and fairness." (Snyder v. Mass. 291 U. S. at p. 105).

In his article on "Interests of Personality" already mentioned Dean Pound said, "The backwardness of preventive justice in American law is a grave defect. In connection with interests of personality, where redress by way of damages is often obviously inadequate if not inapplicable, the hesitation of our law to apply preventive remedies is unfortunate and without just excuse."

We have discussed this subject at length because of the uncertain state of the authorities during many years. We have no decision recognizing a right of privacy and we have no decision denying it. Massachusetts is therefore in a position to declare and establish a right and at the same time establish the procedure to protect it and guard it from abuse.

We, therefore, recommend the declaration and establishment of privacy as a purely equitable right within the "general principles

of equity jurisprudence" to be protected with or without damages exclusively in equity in accordance with established equitable procedure and submit for this purpose the following:

DRAFT ACT

Chapter 214 of the General Laws is hereby amended by inserting after Section 1 the following Section 1A.

"The Supreme Judicial and Superior Court shall have original and concurrent jurisdiction under the general principles of equity jurisprudence to protect with or without damages the equitable interest of personality sometimes called "the right of privacy" of a person against unreasonable and serious interference with such person's interest in not having his affairs known to others or his likeness exhibited to the public.

The foregoing draft contains the substance of Section 867 of the "Restatement of Torts" already quoted but limited in its nature and procedure to equity jurisprudence. The problem stated by the court in the passage quoted as to the difficulty of fixing "boundaries" to the right seem to indicate the procedural nature of the problem as equitable procedure seems naturally adapted to that purpose while a suit at law is not.

BUSINESS ENTRIES AS EVIDENCE IN CRIMINAL CASES

In 1913 Massachusetts led the country with a statute allowing the use of business entries in civil cases. The statute was carefully drawn by a committee of the bar, as Chapter 288 of that year and, as referred to by the court in 293 Mass. at p. 295, that statute was enlarged in 1930 into its present form as recommended by the Judicial Council in its 5th report (1929) for the following reason stated at p. 21:

"In the normal conduct of business operations transactions of variouis kinds are made matters of record by entries in books or on cards or sheets, sometimes made by a participant in the transaction, but often by one to whom information of the facts is communicated by others in regular course. The participants in the various steps of the transaction as finally recorded may have been many. Technical proof of the facts may, under the common law rules of evidence be very difficult or impossible, and yet the record is one upon which the business man and those dealing with him rely—in conducting their affairs. That evidence thus recognized as reliable outside the court room should not be received in court,—has long been a subject of annoyance."

The reason for the extension of the statute in 1930 was explained by the Council as follows:

There are, however, records of various facts or transactions, not matters of accounting, which are just as reliable as account books and which we think

should be dealt with in the same way. A general statute covering all kinds of entries made in the regular course of business is strongly recommended by the committee of lawyers [including Dean Wigmore] whose valuable suggestions as to improvements in the law of evidence have recently been published by "The Commonwealth Fund". The recommendation is endorsed by judges in our own state and must commend itself to the practicing lawyer. In New York and in Rhode Island the statute in an inclusive form has already been enacted.

The admissibility of other books and records should, of course, be safeguarded by the same requirement of a preliminary finding by the court as now constitutes a condition precedent to the admission of account books. The desired result can be readily accomplished in Massachusetts by a simple amendment of the statute concerning account books, broadening its scope so as to include records of other kinds.

The Act of 1913, as amended in 1930, now appears as §78 of Chapter 233 of the General Laws as follows:

"*Entries in Books of Account, etc.*—An entry in an account kept in a book or by a card system or by any other system of keeping accounts, or a writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, if the court finds that the entry, writing or record was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction occurrence or event or within a reasonable time thereafter. For the purposes hereof, the word "business", in addition to its ordinary meeting, shall include profession, occupation and calling of every kind. The court, in its discretion, before admitting such entry, writing or record in evidence, may, to such extent as it deems practicable or desirable, but to no greater extent than the law required before April eleventh, nineteen hundred and thirteen, require the party offering the same to produce and offer in evidence the original entry, writing, document or account or any other from which the entry, writing, or record offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the entry, writing or record offered or the original or any other entry, writing, document or account from which the entry, writing or record offered or the facts therein stated were transcribed or taken, or who has personal knowledge of the facts stated in the entry, writing or record offered. When any such entry, writing or record is admitted, all other circumstances of the making thereof, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight."

We think there is no sufficient reason why such evidence should not be admissible in criminal cases, as well as in civil cases, in the court house in Pemberton Square as it is admissible in the Federal

courts in Post Office Square, not only under an act of Congress similar to, and even more positive than our statute, but also as within the principle of the common law of evidence.

The objection which has been raised to various changes in the past, when applied in criminal cases, has been based on the 12th Article of our Bill of Rights which provides that

> "In prosecutions for crime every subject shall have a right—to meet the witnesses against him face to face."

The same objection was raised in the Federal courts under the Sixth Amendment to the Federal Constitution which provides that

> "In all criminal prosecutions the accused shall enjoy the right—to be confronted with the witnesses against him."

The objection was disposed of in an opinion by one of the ablest of Federal judges in a criminal case as appears below.

A Federal statute was passed, 28 U.S.C.A. §695 (now Section 1732 of Title 28 of the Annotated U. S. Code) which appears in the following passage from the opinion of Judge Augustus N. Hand for the 2nd Circuit Court of Appeals in U. S. v. Leathers 135 Fed. (2nd) 507, (1943) at pp. 510-511. This statute is more positive in its language than our Massachusetts statute applying to civil actions for instead of providing that records "shall not be inadmissible", it provides that they shall be "admissible". The court sustained its constitutionality. Judge Hand said:

"The mailing of the checks was proved" by an air mail stamp shown to have been affixed—in the regular course of business to letters received by air mail.

> "We hold that the introduction of this stamp was warranted both as part of the proof of ordinary business practice and as a record made in the ordinary course of business—admissible both at common law under the doctrine announced in Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co., 2 cir., 18 F.2d 934, and likewise admissible by statute under 28 U.S.C.A. § 695. This section provides that: "any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility."

The appellant Thomas argues that the record in question would not be admissible under the early common law rules and that the recent judicial and statutory changes we have referred to are in contravention of the Sixth Amendment. But statements by relatives as to pedigree, declarations against interest, and most important of all in criminal trials, dying declarations, have long been recognized as admissible. It is not necessary to say what limits the Sixth Amendment may set to the extension of exceptions to the rule against hearsay. Probably the permissible extension is a question of degree. We think that business records kept as a matter of ordinary routine are often likely to be more reliable than dying declarations. It cannot be reasonably argued that the extension of the common law book rule which we discussed in Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., supra, or the statute cited above, involve any violation of the Sixth Amendment."

In an earlier criminal case in the First Federal Circuit (here in Massachusetts) Valli v. U. S. 94 Fed. (2nd) 687, at p. 692, the Circuit Court of Appeals sustained the admission of records of telephone calls, without reference to the Federal statute and therefore, as within the principle of the common law rule about circumstantial evidence. After citing a number of Federal opinions the court said:

"While formerly at common law such evidence may not have been admissible under the hearsay rule, the law, however, is not static and the impossible is not required in these days of complicated business to meet the rules of evidence adopted when earlier and simpler methods of doing business were customary. With a business like that of the New England Telephone and Telegraph Company requiring many employees, who make records of hundreds of calls daily, if litigants were compelled to summon each employee engaged in making every record requiring proof, it would render the rules of evidence as originally recognized at common law an obstruction to justice instead of a means of promoting it. Funk v. U.S. 290 U.S. 371, 381."

In the Funk case in the Supreme Court of the United States thus cited, the opinion is one of the leading opinions recognizing the adaptability of the rules of evidence (which are administrative in character) to changing conditions. The court said (at p. 381):

"The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth and since experience is of all teachers the most dependable and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or nonwisdom of the old rule."

The admission of such business records does not, of course, change the burden of proof on the government to prove the guilt

of a defendant beyond a reasonable doubt. As specifically provided in our statute (§78 above quoted) and in the Federal statute, as well as by common fairness, the weight of the evidence of such entries may be challenged and attacked. The statutes merely provide that the entries, as circumstantial evidence, shall not be automatically excluded. (See opinion of Chief Justice Rugg in Com. v. Slavsky, 245 Mass. 405.) The development of rules of evidence was also described by our court in Memier's Case, 319 Mass., at p. 425, without distinction between civil and criminal cases, as follows:

"The Legislature doubtless has the power to prescribe the rules of evidence and the methods of proof to be employed in trials in court and in hearing before administrative boards. It may change the rules of common law or those provided by existing statutes, and may make competent that which had been previously inadmissible. Dying declarations in a prosecution for unlawfully procuring an abortion, the habits of a deceased person in discharging his financial obligations, the answers to interrogatories of one who has died before the trial, the declarations of a deceased person, concerning facts of which he had personal knowledge, private conversations between husband and wife, entries in books of account made in the usual course of business, records of certain hospitals concerning the condition of a patient and his medical history, and records of bank accounts, are familiar illustrations. See in their present form G.L. (Ter. Ed.) c. 233, SS 64, 65, 65A 66, 76, 77, 78, 79. Rights and remedies unknown to the common law may be created; procedure may be altered and the burden of proof shifted from one party to another. Kendall v. Kingston, 5 Mass. 524, 534. Hall v. Reinherz, 192 Mass. 52. Opinion of the Justices, 209 Mass. 607, 610. Duggan v. Bay State Street Railway, 230 Mass. 370. Commonwealth v. Slavski, 245 Mass. 405. Whiteside v. Merchants National Bank, 284 Mass. 165. Opinion of the Justices, 309 Mass. 571. The Legislature ordinarily has the power to prescribe the weight that must be accorded to certain evidence. Holmes v. Hunt, 122 Mass. 505, 516. Commonwealth v. Slavski, 245 Mass. 405. Walcott v. Sumner, 308 Mass. 413. The proof of one fact may be made prima facie evidence of another fact, Commonwealth v. Williams, 6 Gray, 1; Commonwealth v. Pillsbury, 12 Gray, 127; Commonwealth v. Rowe, 154 Gray, 47; Commonwealth v. Barber, 143 Mass. 560, 562; Commonwealth v. Anselvich, 186 Mass. 376; Shamlian v. Equitable Accident Co. 226 Mass. 67, 70; Smith v. Freedman, 268 Mass. 38, provided there is a rational connection between the two facts. Opinion of the Justices, 208 Mass. 619, 624. Tot v. United States, 319 U. S. 463. New Port Richey v. Fidelity & Deposit Co. 105 Fed. (2d) 348. Packard v. O'Neil, 45 Idaho, 427. Hawkins v. Ermatinger, 211 Mich. 568."

In Massachusetts today, because of the uncertainty in the minds of the courts and the bar as to the admissibility of business entries, criminal trials are unduly extended and justice obstructed, delayed and, perhaps, defeated by the exclusion of modern business records on which everybody outside of a court house relies in

conducting the business, public or private, throughout the country. Modern American business could not survive without such reliance. With the enormous increase and variety of circumstances in the modern world the resulting variety of probative circumstantial evidence should, reasonably, be recognized. Public records are admissible and properly kept private business records should also be admissible if justice is to be administered in the courts instead of being driven out of the courts to arbitration. We do not think the present practice of excluding them makes sense and in the light of the opinions quoted (to which others might be added) we recommend the following:

DRAFT ACT

Section 78 of Chapter 233 of the General Laws (quoted above) is hereby amended by inserting after the word "civil" in the clause beginning "shall not be inadmissible" the words "or criminal" so that said clause shall read "shall not be inadmissible in any civil *or criminal* proceeding" and by adding at the end of the last sentence of said section the following—

"and when such entry, writing or record is admitted in a criminal proceeding all questions of fact which must be determined by the court as the basis for the admissibility of the evidence involved shall be submitted to the jury, if a jury trial is had for its final determination."

H. 1056 RELATIVE TO APPOINTMENT OF GUARDIANS OF INSANE PERSONS

(*Referred by Resolves Chapter 29*)

This bill, printed below, proposes to insert in the present statute the words printed in italics in lines 12 and 13 and 25 to 34. Except for those insertions, the bill is the same as the present Section 6.

H. 1056

Chapter 201 of the General Laws is hereby amended by striking out section 6, as most recently amended by section 13 of chapter 194 of the acts of 1941, and inserting in place thereof the following:—

Section 6. Two or more relatives or friends of an insane person, or the mayor and aldermen of a city or the selectmen of a town in which he is an inhabitant or resident, or the department of mental health, may file a petition in the probate court asking to have a guardian appointed for him; and if after notice, as provided in section seven, and a hearing the court *(or the jury in the event that jury issues are framed as hereinafter provided)* finds that he is *insane and* incapable of taking care of himself, the court shall appoint a guardian of his person and estate. A copy of such appointment shall be sent by mail by the register to the said department. The court

may require additional medical testimony as to the mental condition of the person alleged to be insane and may require him to submit to examination. It may also appoint one or more physicians, expert in insanity, to examine such person and report their conclusions to the court. Reasonable expense incurred in such examination shall be paid out of the estate of such person or by the county as may be determined by the court. *In any proceeding under this section or under section thirteen of this chapter any party may as of right upon seasonable application to the court have framed and submitted to a jury for trial in the superior court in the manner provided in section sixteen of chapter two hundred and fifteen the following issues:—*

1. *Is the respondent insane?*

2. *Is the respondent incapable of taking care of himself?*

We do not recommend the bill which would force jury trials of questions of insanity and change the law as decided by the Supreme Judicial Court in 1952 in Bashaw v. Willett, 327 Mass. 369. In that case the respondent appealed from a denial of a jury trial "on the issues of insanity and ability to take care of himself" and claimed a constitutional right to a jury trial.

The court said (at p. 372) "We are not convinced—that one alleged to be an insane person was entitled as of right to a trial by jury as to his sanity prior to the adoption of the Constitution of our Commonwealth in 1790. To adopt his [the respondent's] theory would be to ignore what has been the long held understanding in this Commonwealth."

So far as we are aware there has never been a jury trial in Massachusetts in cases of the appointment of a guardian of an insane person, and as Chief Justice Rugg said, in a passage quoted in the case referred to, such questions "require the sympathetic wisdom of an experienced judge, rather than the decision of a jury."

One of the most recent and extensive discussions of "Legal and Medical Considerations in Commitment of the Mentally Ill" appeared in 56 Yale Law Journal (pp. 1178-1209) in 1947. The matter of jury trial was discussed at pp. 1192-1193 and a student of mental illness was quoted as saying that jury trial in such cases "is about as sensible as calling in the neighbors to diagnose meningitis or scarlet fever." We agree.

We are aware that Section 1 of Chapter 645 of the Acts of 1953 as to recommitment of persons previously committed as "defective delinquents" contains the sentence "If a person so requests, an issue or issues shall be framed and submitted to a jury", but that does not change our opinion that H. 1056 should not be enacted.

Thus far we have discussed this matter solely from the point of view of the patient and the public in the light of our legal history, which is related to the medical history of the subject. But there is another very practical aspect. For the year 1951-52 there were 5615 commitments in the District Courts and 1579 in the Probate Courts.* Jury claims in any substantial number of these cases would interrupt and delay not only all the other litigation in the Superior Court, but the delay and publicity of such claims and trials would, in our opinion, seriously affect the mental condition of borderline patients and cause endless additional distress to their families and lessen the protection of the public.

JUDGMENTS IN ACTIONS OF CONTRACT IN WHICH THERE IS NO DISPUTE OF FACT

As pointed out elsewhere in this report, the legislature, shortly after the Judicial Council was created in 1924, by Resolves Chapter 27 in April 1925, requested the Council "to investigate—ways and means that may appear feasible—for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public may be minimized."

In the case of Atwood v. Boston, 310 Mass. 70, at p. 75, the late Mr. Justice Dolan said:

> "Where there is conflicting evidence respecting the circumstances of the parties and the condition of the subject with which they are dealing, then a proper case arises for the jury. Way v. Greer, 196 Mass. 237, 246, 247. But where as appears in the present case the extrinsic evidence is not disputed or conflicting as to the material facts required to be found, the interpretation of the contract in its light still *remains a question for the judge.* Smith v. Faulkner, 12 Gray, 251, 255. Williston, Contracts (Rev. ed.) s. 616. 65 Am. L. R. 648, 652. Construing the contract in question, guided by these principles, we are of opinion that the judge should have granted the defendant's motion for a directed verdict in its favor. . . ."

In Howe v. Natl. Life Ins. Co., 321 Mass. 283, there was no dispute as to the facts on which it was decided that "the plaintiff—had no cause of action" to be tried (see p. 289). Under the bill which we recommend those undisputed facts could have been ascertained in advance of trial and the question of law argued and decided instead of wasting the time and money of the public and the parties by a needless and futile trial when there was nothing for the jury to try.

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* See 28th Report of Judicial Council, pp. 83 and 118 and pp. 53 and 94 of this report.

The bill submitted below is specially guarded in its wording *by the words printed in italics.* We again recommend the following:

DRAFT ACT

AN ACT TO PERMIT JUDGMENT IN ACTIONS OF CONTRACT IN WHICH THERE IS NO DISPUTE OF FACT.

SECTION 1. Chapter 231 of the General Laws is hereby amended by striking out section 59 and the caption immediately preceding it, as appearing in the Tercentenary Edition, and inserting, under the caption MOTION FOR SUMMARY JUDGMENT, the following section:—

Section 59. In any action of *contract, except an action against an executor or administrator for liability of the deceased,* at any time after the completion of the pleadings counsel for either party may file an affidavit that in his belief *there is no genuine issue of material fact but only questions of law* in connection with all or some part of the action, or of some issue determinative thereof, and move for an immediate entry of judgment thereon. Said motion may be accompanied by affidavits on personal knowledge of admissible facts as to which it appears *affirmatitvely* that the affiants would be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion unless within twenty-one days, or such further time as the court may order, contradictory affidavits are filed, or the opposing party shall file an affidavit showing specifically and clearly reasonable grounds for believing that contradiction can be presented at the trial but cannot be furnished by affidavits. Copies of all motions and affidavits hereunder shall be furnished upon filing to opposing counsel. If admissions in the pleading, interrogatories, admissions under chapter two hundred and thirty-one, section sixty-nine, stipulations or *affidavits* hereunder *show affirmatively, that* except as to the amount of damages *no genuine issue of material facts exist and that there is nothing to be decided except questions of law,* an order for default, or judgment for the moving party, shall forthwith be entered *if he shall be entitled thereto as a matter of law,* subject to an assessment of damages, if required.

Section 2. Said chapter 231 is hereby further amended by striking out section 59A, as so appearing, and inserting in place thereof, under the caption ADVANCING CAUSES FOR SPEEDY TRIAL, the following section:—

Section 59A. In any action at law or suit in equity in the supreme judicial court or in the superior court, the court may on motion for cause shown advance said action or suit for speedy trial. If, in an action removed by the defendant from a district court, the court is satisfied, upon an inspection of the declaration, that the plaintiff seeks to recover solely for his personal labor, with or without interest, the court shall, upon motion, advance such action for speedy trial.

Section 2 of the bill does not change the law, but merely transfers a sentence now in Section 59 to Section 59A where it belongs.

A bill on this subject (H. 486 of 1948) was referred to the Council by Resolves of 1948, Chapter 6. The Council recommended a revised draft in its 24th report in that year and again in its 25th report in 1949. It was favorably reported in 1950 and passed the House and ordered to a 3rd reading in the Senate but failed of passage. We again recommended it in the 26th and 27th reports. In 1951 it was substituted in the House for an adverse committee report but failed again in the Senate. We recommended it again in the 28th report with additional explanation (see pp. 30-31). The procedure is familiar in the Federal Courts and in other states.

INTERLOCUTORY REPORTS IN CRIMINAL CASES

In the 28th report (in 1952 pp. 32-35) we explained the history of the statutes providing that a justice of the Superior Court may in civil cases report in advance of trial a question whether his ruling on an important question of law is right or wrong before the parties, witnesses and the public are subjected to the ordeal and waste of time and expense of a long trial. We pointed out that the justices of the Supreme Judicial Court could do this in both civil and criminal cases in the 19th century when they tried criminal cases and continued

". . . .With the expansion of law in many directions and the fact that all criminal trials were transferred from the Supreme Judicial Court to the Superior Court many years ago, we think the authority which a justice of the Supreme Court formerly had should also be given to the Superior Court justices who now have the responsibility of conducting criminal trials. It would seem that they should have authority expressly recognized by statute, to deal with exceptional cases and prevent the possible injustice of a protracted trial (lasting perhaps weeks or months and delaying other trials) by a carefully prepared interlocutory report, where the judge considers that justice to the Commonwealth and the defendant calls for a decision whether his ruling on a decisive question of law is right or wrong before everyone involved is subjected to the ordeal of a long trial. Excessive use of such interlocutory reports by trial judges can be readily checked by the sound judicial discretion of the Supreme Court in criminal cases as it is in civil cases. . . .

"When such authority and discretion exists, as it should, in the trial judge in civil cases, we see no reason why it should not exist in criminal cases in which a man's life, liberty or reputation may be involved." We again recommend the following:

DRAFT ACT

Chapter 278 of the General Laws is hereby amended by inserting after section 30 a new section 30A as follows:

Section 30A. If prior to the trial of a person in a criminal case in the Superior Court, a question of law arises which in the opinion of the presiding justice, is so important or doubtful as to require the decision of the Supreme Judicial Court thereon *before trial*, in the interest of justice, he may report the case so far as necessary to present the question of law arising therein; and thereupon the case shall be continued for trial to await the decision of the Supreme Judicial Court.

SPECIFIC PERFORMANCE

In our report of 1951 (and again in our 28th report in 1952, p. 26) we recommended an act to clarify the law relating to the specific performance of contracts. This suggestion was not adopted. Our reasons were stated in full in that report pp. 9-13 and for those reasons incorporated herein by reference we again recommend the act thus submitted, with a clause inserted (to avoid misunderstanding) that the act shall not apply to contracts for purely personal service such as a contract by a singer to sing or other similar purely personal service. Such services obviously differ from contracts to secure, or complete and deliver a car, or machine or other things. We recommend the following:

DRAFT ACT

Chapter 214 of the G.L. is hereby amended by inserting after Section 1 a new section 1A as follows:

Section 1A. The fact that the plaintiff has a remedy at law for damages shall not bar a suit in equity for specific performance *of a contract other than one for purely personal services* if the court finds that no other existing remedy or the damages recoverable thereby are in fact the equivalent of the performance promised by the contract relied on by the plaintiff and the court may order specific performance if it finds such remedy to be practicable. If performance is not decreed, damages may be determined in the proceeding, and if the defendant claims a jury on that issue, the issue shall be framed and referred for jury trial.

TELEVISING AND BROADCASTING TESTIMONY

In our last report (1952) we called attention to a resolution of the American Bar Association,

> "That the American Bar Association condemns the practice of television and broadcasting the testimony of witnesses when called before investigating committees of Congress and recommends that appropriate action be taken to restrain or prevent it.

The New York legislature, by chapter 241 of the acts of 1952, provided,

" 'No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of a proceeding in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee administrative agency or other tribunal in this state.

" 'Any violation of the section shall be a misdemeanor.

" 'This act shall take effect immediately.' "

We think not only that somewhat similar legislation should be enacted in Massachusetts but that it should contain the additional protection for the witness of the right to refuse to testify under such conditions so that he can protect himself and that no adverse inference, implication or comment should be made as to such refusal.

However much the public may enjoy the spectacle, experienced judges and lawyers know that the ordeal of witnesses, and we mean honest witnesses, in being examined by lawyers or others is often a severe ordeal under any circumstances. They are often unaccustomed to such proceedings and are shy, nervous and frightened and uncertain. This is, of course, intensified when they are made conscious of being spectacles in a public drama on the screen or on the air. It is not in the tradition of American justice. We think it should be stopped and that Massachusetts should prevent it before it begins here and help to lead the way to better practice. We again recommend the following:

DRAFT ACT

Chapter 268 of the General Laws is hereby amended by adding at the end thereof the following new sections:

Section 39. No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within the Commonwealth of any proceedings in which the testimony of witnesses is or is to be taken, before a legislative, judicial or executive body or other public agency or tribunal. Violation of this section shall be punishable by a fine of one thousand dollars or a sentence to jail or the house of correction for not more than one year.

Section 40. No such body, agency or tribunal conducting such a proceeding in this Commonwealth, nor anyone on its behalf shall require or permit any person to testify before televising, broadcasting or motion picture instruments or apparatus in operation. Any person may of right refuse to testify before such instruments or apparatus and no proceedings for contempt or other adverse proceedings shall be taken against him for such refusal nor shall such refusal be commented on or made the basis of any inference whatever adverse to the person so refusing.

Sections 39 and 40 may be enforced by proceedings in equity.

HOUSE 2377 TO RESTRICT THE AUTHORITY OF THE ATTORNEY GENERAL AND DISTRICT ATTORNEYS TO AUTHORIZE WIRE TAPPING

(Referred by Resolves, Chapter 32)

We do not recommend this bill.

The present law (Section 99 of Chapter 272 of the General Laws) provides:

"Section 99. Eavesdropping.—Whoever, except when authorized by written permission of the attorney general of the commonwealth, or of the district attorney for the district, secretly overhears or attempts secretly to overhear, or to have any other person secretly overhear, any spoken words in any building by using a device commonly known as a dictagraph or dictaphone, or however otherwise described, or any similar device or arrangement, or by tapping any wire, with intent to procure information concerning any official matter or to injure another, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both." (1920, 558, ss 1.) See Com. v. Publicover, 327 Mass. 303.

Section 1 of the bill (H. 2377) would insert the words:

"pursuant to an order issued by a justice of the Supreme Judicial or Superior Court as provided in Section ninety-nine A" and Section 2 would insert a new section 99A as follows:

Section 99A. An order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme judicial or superior court upon oath or affirmation of the attorney general of the commonwealth or of the district attorney for the district that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communications and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order, the justice may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein, but not for a period of more than three months, unless extended or renewed by the justice who signed and issued the original order, upon satisfying himself that such extension or renewal is in the public interest. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A copy of such order shall be impounded by the justice issuing the same.

This bill would "hamstring" the public law enforcement officers in investigating crime at a time when organized criminals, throughout the country, are violating every law of God and man, by murder, robbery, rape, kidnapping, treason, etc. See "Murder Inc." by Feder and Turkus (reviewed in the 38 Mass. Law Quarterly No. 1, April 1953 p. 86); "Terror in the Streets" by Howard Whitman; "In the Reign of Rothstein" by Donald Henderson Clarke. It would give offenders a still better chance for every form of criminal activity against law-abiding citizens with less fear of detection, thus leaving the people still more unprotected by their laws.

It has been said that "wire tapping" is "dirty business." That is true enough for people who mind their own business and think that others should also; but to magnify it into a legal principle as to criminal law enforcement seems to us a violation of common sense in our modern age of mechanical devices. The protection of individual privacy in a man's house has been a sound American principle ever since the pre-revolutionary days of the 18th century; but that principle did not extend to conversations with persons outside of the house by means of a mechanical device. There were no such devices then. Today we have them. The protection of society seems to us to demand that a person who makes use of such devices to converse with persons outside the house must take his chances of being overheard by law enforcement officers just as he does if he converses with someone outside his house without a telephone. We have never heard it suggested that there was anything wrong or unreasonable in even a private citizen's listening to a conversation of persons who are planning illegal activities on Boston Common, if he happens to be near enough, and reporting it to proper authorities. On the contrary the public is constantly urged to acquire and report such information.

Thus far we have discussed the matter from the point of view of common sense as we see it. We think that we should also point out that during the past 20 years or so there have been great differences of opinion among the judges on the Federal and State courts with resulting confusion as to the meaning and effect of Section 605 of Title 47 of the United States code which penalizes wire-tapping entirely. There has been much discussion, not only in opinions, but in articles in legal periodicals, partly due to the somewhat dramatical phrase "dirty business" used by Mr. Justice Holmes in a dissenting opinion in Olmstead v. U. S., 277 U. S. 438.

The present Massachusetts act (Section 99) which H. 2377 seeks to change, differs from the Federal act in allowing the Attorney General and District Attorneys to authorize wire-tapping, as we

believe they should be allowed. This Massachusetts practice finds support in various volumes and, especially, in comments by the late Dean Wigmore, the distinguished author of the standard work on "Evidence", and of Hon. Augustus Hand of the Second Circuit Court of Appeals.

Dean Wigmore said:

As to the "unethical" aspect, it suffices to note that Holmes, J., in his dissent (which is a model of Saxon English and pointed brevity) refers to this act of wire-tapping as "dirty business". But so is likely to be all apprehension of malefactors. Kicking a man in the stomach is "dirty business", normally viewed. But if a gunman assails you, and you know enough of the French art of "sabotage" to kick him in the stomach and thus save your life, is that "dirty business" for *you*? If your telephone number is 2441, and an intending burglar, plotting to enter your house is given your number at Central by error for 2414, and you at the telephone hear with amazement the start of his conversation with his co-conspirator, is it "dirty business" for you to continue to overhear his plot to the end? No, no. Ordinarily no gentleman listens to another gentleman's private conversation. But we respectfully decline to agree that it is "dirty business" for a gentleman to overhear deliberately a conversation held by a professed law-breaker in the process of doing his unlawful act.

"So much for the ethics of the case.

"The application of the terms of the Fourth Amendment (as to search and seizure) may be based on its literal words, or on its purpose and policy.

"On the literal words, the overhearing of a conversation at a physical distance is neither a search nor a seizure of him or his premises. This conclusion need not be labored.

"On the purpose and policy of the Amendment, . . . we wonder how many of either counsel or judges have ever read in full the original opinion on which the whole principle is based, viz., the opinion of Lord Camden, Chief Justice, in the year 1762, in Entick v. Carrington (Howell St. Tr. XLX, 1029). It is a very healthy, sturdy opinion, and ought to satisfy all lovers of liberty and dreaders of bureaucratic oppression. Yet there is nothing in its description of the evils of search and seizure which would make one apply the description to the act of wire-tapping."

The same might be said of the famous case of the writs of assistance in Massachusetts in 1761 which led to the 4th amendment and the 12th article of the Massachusetts Bill of Rights.

In U.S. v. Polakoff 112 Fed. 2nd 888 Judge Hand, while concurring in the opinion as to Section 605, Title 47 of the code be-

*See Wigmore on Evidence, 3r ed. vol. 8, section 2184a pp. 50-51.

cause he felt, reluctantly, bound by the opinion of the Supreme Court in Nardome v. U. S. 302 U. S. 379 and other cases, said—

> "I am convinced that prohibition of the use of wire taps to detect the activities of criminals who choose to conduct their negotiations by means of the telephone, imposes great, and at times, insurmountable obstacles upon prosecuting authorities in the detection and prosecution of crime, nor do I see the fundamental difference between evidence obtained in this way and by many other methods of detection which I suppose to be permissible.
>
> "In the face of the foregoing Supreme Court decisions any remedy must rest with Congress who, in my opinion, can constitutionally permit wiretapping by government authorities. . . "

See also the dissenting opinion of Mr. Justice Sutherland in Nardome v. U. S. 302 U. S. 379 at pp. 385-387 which he closes with the following statement:

> "In the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried . . . to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality."

We think H. 2377 should be opposed in the public interest.

EXCEPTIONS BY THE COMMONWEALTH IN CRIMINAL CASES

In Massachusetts the only way in which the people of the commonwealth can find out what the law is in criminal cases and whether it has been properly applied in a particular case is from the opinions of the Supreme Judicial Court in cases appealed by the defendant. The commonwealth is not allowed, in case of an acquittal or other decision of the trial court against the government, to carry the case to the supreme court by appellate proceedings. In days of modern "organized crime" and nation-wide agitation about the prevalence of crime and the escape of alleged criminals through legal proceedings we see no sufficient reason why this ancient rule should be retained in full as it seems to be against the public interest in the administration of justice. All trial judges who have to act quickly in the many cases civil or criminal which come before them whether with or without a jury make mistakes sometimes and it is to correct such mistakes and declare the law correctly that the Supreme Judicial Court exists. We see no reason why the right of appeal in a criminal case should be a "one way street" so that a dangerous criminal can escape because a judge makes a mistake. That this appears to have been the view of Chief Justice Shaw, see his opinion in Com. v. Cummings, 3 Cush. 212.

In many of the other states appellate proceedings by the government are allowed in varying degrees. There has existed for more than half a century in Connecticut the following statutory provision.

The Connecticut Statute as quoted and sustained in 302 U.S. at p. 321 provides

> "Section 6494 [now Section 8812 of the Revision of the General Statutes of 1949]. *Appeals by the state in criminal cases.* Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

This statute was held valid by the Connecticut court in 1894 in State v. Lee, 65 Conn. 265 and subsequent cases and by the Supreme Court of the United States in Palko v. Connecticut 302 U. S. 319 in which the court established its validity. The practice under it is described by Chief Justice Wheeler in State v. Carabetta, 106 Conn. 114 at 116.

A statute of Vermont (G.L. 2598) was given the same effect and upheld as constitutional in State v. Felch, 92 Vt. 477; 105 Atl. 23.

The objection that has been raised in the past has been that a new trial because of errors of law would place the defendant in what is known to the law as "double jeopardy."

This objection was answered in a minority opinion by Mr. Justice Holmes, concurred in by Justices White and McKenna, in 1903 in *Kepner v. U. S.* 195 U. S. at p. 134 (and subsequently approved by the court).

Mr. Justice Holmes said,

> ". . . it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree, United States v. Perez, 9 Wheat. 579; see Simmons v. U. S., 142 U. S. 148; Logan v. United States, 144 U. S. 263; Thompson v. United States, 155 U. S. 271, or notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. Hopt v. People, 104 U. S. 631, 635; 110 U. S. 574; 114 U. S. 488, 492; 120 U. S. 430, 442; United States v. Ball, 163 U. S. 662, 672. He even may be tried on a new indictment if the judgment on the first

is arrested upon motion. Ex parte Lange, 18 Wall. 163, 174; 1 Bish. Crim. Law (5th ed.), s. 998. I may refer further to the opinions of Kent and Curtis in People v. Olcott, 2 Johns. Cas. 301; S. C., 2 Day, 507, n.; United States v. Morris, 1 Curtis, 23, and to the well-reasoned decision in State v. Lee, 65 Connecticut, 265.

"If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor than would he when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial."

After referring to this opinion in Palko v. Connecticut (above cited) at p. 323, the court, in the opinion by Mr. Justice Cardozo, discussed the provisions of the Federal constitution and cited Snyder v. Massachusetts, 291 U. S. 97, in which the court said (at p. 105),

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conceptions of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining v. New Jersey, 211 U. S. 78, 106, 111."

The court concludes that the Connecticut statute merely provides that "there shall be a trial free from the corrosion of substantial legal error."

"Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions? The answer must be "no".

And the statute was sustained.

OTHER ACTS

The Federal Act

The Federal Act (U. S. code Title 18 s. 3731) provides for appeals direct to the Supreme Court from a district court in the following instances:

"From a decision or judgment setting aside or dismissing any indictment or information or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting judgment of conviction for insufficiency of the indictment or information where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances

"From a decision or judgment setting aside or dismissing any indictment or information or any count thereof except" (where direct appeal to Supreme Court)

"From a decision arresting a judgment of conviction except" (where direct appeal to Supreme Court)

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance."

THE MODEL DRAFT OF MODEL CRIMINAL CODE OF AMERICAN LAW INSTITUTE OF 1930 (before the Palko case was decided) was

"Section 428. Appeal by State (Commonwealth or People.)

An appeal may be taken by the State (Commonwealth or People) from:

(a) An order quashing an indictment or information or any count thereof.

(b) An order granting a new trial.

(c) An order asserting judgment.

(d) A ruling on a question of law adverse to the State (Commonwealth or People) where the defendant was convicted and appeals from the judgment.

(e) The sentence, on the ground that it is illegal."

For the various statutes see page 1203 of the "Model Code" containing 7 pages of notes from all the states and the United States.

The members of the Council are divided on the advisability of adopting the Connecticut practice to its full extent but they are unanimous in recommending government exceptions on the questions of law whether an indictment or information has been legally quashed or dismissed; whether a case has been illegally taken from the jury and a verdict directed for the defendant, and whether an illegal sentence has been imposed, and to that end recommend the following

DRAFT ACT

Section 31 of chapter 278 of the General Laws as amended by the chapter 384 of the acts of 1953 is hereby amended by adding at the end thereof the following sentence.

"Exceptions upon questions of law arising on the quashing or dismissing by the court of an indictment or information; a directed verdict for the defendant; or an illegal sentence may be taken by the Commonwealth in a criminal case in the same manner and to the same effect as if taken by the defendant and when so taken shall be governed by this section. Pending the prosecution and determination of the exceptions the defendant shall be admitted to bail on his own recognizance."

The provision for release on the defendant's own recognizance is similar to that in the Federal Statute already quoted.

S. 278 TO MAKE ILLEGAL THE USE OF A TELEPHONE TO PLACE OR REGISTER BETS

(Referred by Resolves Chapter 22)

This bill provides—

"Chapter 271 of the General Laws is hereby amended by inserting after section 17 the following section:—

"Section 17A. Whoever uses a telephone for the purpose of placing or registering bets, or buying or selling of pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine or upon the result of an athletic game or contest, shall be punished by imprisonment in the state prison for three years."

We do not recommend this bill.

To penalize the use of a telephone merely by gamblers while all other offenders, such as murderers or kidnappers, can use it freely, does not seem to us sound legislation.

JURY COMMISSIONERS IN A LIMITED DISTRICT

In the 23rd and 24th reports (in 1948) the Council described the system of jury selection in Ohio and recommended an act to provide for two jury commissioners and assistants to list and draw jurors in a district comprised of the counties of Middlesex, Suffolk and Norfolk. The reasons for the proposal were stated in the 24th report with an account of the discussions here and elsewhere after the "jury fixing" exposures of the early thirties. We still believe that the reasons in the 24th report pp. 19-23 are sound and renew the recommendation of the draft act printed in that report on pages 23-26 incorporated herein by reference.

CLAIMS AGAINST ESTATES

It has been called to our attention that there is need of slight amendments of Chapter 197 of the General Laws to protect executors and administrators from liability for certain claims against estates of which they have no notice when distributing the estate after the expiration of one year from the approval of their bonds as provided in that chapter.

Section 9 of that chapter 197 as amended by St. 1931 Ch. 417 (following a recommendation of the Council in its 6th report—pp. 21-22) and further by St. 1933 Ch. 221 sec. 4 now provides that an executor or administrator "shall not be held to answer to an action . . . which is not *commenced* within one year from the time of his giving bond . . . or to such an action which is com-

menced *but not entered* within said year unless before the expiration thereof the writ . . . has been served by delivery in hand . . . or a notice . . . filed in the proper registry of probate."

These words also appear in the section as further amended by sec. 4 of Ch. 221 of the Acts of 1933. The clause "or to such action which is commenced but not entered" was not in the draft submitted in the 6th report of the Council.

As the matter now stands, under Parker v. Rich, 297 Mass. 111 and Gray v. Dahl, 297 Mass. 260, if, before the end of the year, an action is "commenced", meaning by that the delivery of the writ to an officer with instructions to make service, but the writ is not served, or notice filed, before the end of the year, even if the suit is "entered", before or after the end of the year, the fiduciary is subjected to the risk that an action is pending of which he does not know and which is not caught by what is now G. L. Ch. 197, sec. 9, as amended by Acts 1931 Ch. 147 and Acts 1933 Ch. 221 sec. 4, unless he inquires of all officers who might have writs to serve on him.

Section 10 permits the prosecution of claims after the expiration of the year upon a bill in equity seeking such relief and protects the executor or administrator as to any distribution made before the bill is *filed*. As the bill may be filed without prior notice to the fiduciary and may be filed in any one of a number of counties, there is presented an unnecessary risk to the fiduciary, which should be eliminated.

We therefore recommend the following

DRAFT ACT

Sec. 1. Section 9 of Chapter 197 of the Gen. Laws as most recently amended by Sec. 4 of Chap. 221 of the Acts of 1933 is hereby further amended by striking out the words "but not entered" in the two places where they appear.

Sec. 2. Section 10 of said chapter is amended by striking out the same and substituting therefore the following (new words printed in italics):

"Sec. 10. If the Supreme Judicial Court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding section, deems that justice and equity require it and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person, *provided forthwith upon the filing of the bill a notice like that provided in the preceding section has been filed in the Registry of Probate for the county in which the estate is being administered;* but such judgment shall not affect any payment or distribution made before the filing of such bill *and notice.*"

H. 1011 FOR AN ADMINISTRATOR FOR THE COURTS AND AN ANNUAL CONFERENCE OF JUDGES

(Referred by Resolves Chapter 20)

This bill reads:

AN ACT TO IMPROVE THE JUDICIAL SYSTEM BY PROVIDING FOR AN ADMINISTRATOR FOR THE COURTS AND FOR AN ANNUAL CONFERENCE OF JUDGES.

Chapter 211 of the General Laws is hereby amended by adding the following new sections:—

Section 24. There shall be an administrator for the courts who shall be appointed by the chief justice of the supreme judicial court and shall hold office at the pleasure of the appointing power. He shall receive from the commonwealth a salary to be fixed by such chief justice, with the approval of the governor and council.

Section 25. The administrator for the courts, with the approval of the chief justice of the supreme judicial court, shall appoint and fix the compensation of such assistants as are necessary to enable him to perform the powers and duties vested in him. During his term of office or employment, neither the administrator nor any assistant shall engage directly or indirectly in the practice of the law in any of the courts of this commonwealth.

Section 26. The administrator for the courts shall, under the supervision and direction of the supreme judicial court:—

(a) Examine the administrative methods and systems employed in the offices of the clerks of the courts and make recommendations for the improvement of the same;

(b) Examine the state of the dockets of the courts and determine the need for assistance by any court;

(c) Make recommendations to the chief justice of the supreme judicial court relating to the assignment of judges where courts are in need of assistance and carry out the directions of said chief justice as to the assignments of judges where the courts are in need of assistance;

(d) Collect and compile statistical and other data and make reports of the business transacted by the courts and transmit the same to the supreme judicial court to the end that proper action may be taken in respect thereto;

(e) Prepare and submit budget estimates of appropriations necessary for the maintenance and operation of the judicial system and make recommendations in respect thereto;

(f) Draw all requisitions for the payment out of public moneys appropriated for the maintenance and operation of the judicial system;

(g) Collect statistical and other data and make reports relating to the expenditure of public moneys, state and local, for the maintenance and operation of the judicial system;

(h) Obtain reports from clerks of courts in accordance with law or rules adopted by the supreme judicial court on cases and other judicial business in

which action has been delayed beyond periods of time specified by law or rules of court, and make report thereof to the supreme judicial court;

(i) Formulate and submit to the supreme judicial court recommendations of policies for the improvement of the judicial system; and

(j) Attend to such matters as may be assigned by the supreme judicial court.

Section 27. The judges, clerks of the courts and all other officers, state and local, shall comply with all requests made by the administrator or his assistants for information and statistical data bearing on the state of the dockets of such courts, and such other information as may reflect the business transacted by them and the expenditure of public moneys for the maintenance and operation of the judicial system.

Section 28. The supreme judicial court may provide by rule or special order for the holding of an annual conference of the judges of the courts and of invited members of the bar, for the consideration of matters relating to judicial business, the improvement of the judicial system and the administration of justice. Each judge attending shall be entitled to be reimbursed for his necessary expenses to be paid from appropriations made for such purposes.

Section 29. Notwithstanding the provisions of any law to the contrary, the assignment of the judges of any of the courts of the commonwealth shall be subject to the approval of the chief justice of the supreme judicial court.

Section 30. The provisions of the foregoing six sections shall apply to all the courts of the commonwealth.

We do not recommend this bill.

We are aware of the increasing number of studies in recent years throughout the nation dealing with the administrative business of courts which were given impetus by the Acts of Congress authorizing the Federal Rules and creating the Administrative Office of the United States Courts and the notable reorganization of the courts and their administrative system in New Jersey. The New Jersey system is most recently described by Mr. Willard G. Woelper (who served as Administrative Director of the Courts of New Jersey from 1948 through 1952) in an article on the "Work of the Modern Administrator of Courts".*

The proposed bill (H. 1011 printed above) is based on a Model Act prepared and approved by the Conference of Commissioners on Uniform State Laws in 1948.

While the creation of the Office of an Administrator for the Courts appears to have merit, consideration of this bill should, in our opinion, be preceded by a detailed study of the administrative problems of our courts and the powers they now have to regulate

* See the Annals of the American Academy of Political and Social Science for May 1953, pp. 147-153.

the conduct of their own business for the purpose of determining whether this proposal is adapted to or needed in the administration of justice in the Commonwealth.

Suggestions for unification of courts and of their administration are not new in this Commonwealth. They were submitted to, and considered by, the Judicature Commission thirty-four years ago in 1919-20 and were discussed in their 2nd report (House Document 1205 of 1921, reprinted in six Mass. Law Quarterly, No. 2, pp. 22-25). On page 23, that Commission said, "We are dealing with a system for the administration of justice in an old Commonwealth where, whatever may have been the defects of the system, the personal character and ability of most of the individuals who have held judicial office have, on the whole, made the system work, as modified from time to time during a period of one hundred and forty years, in such a way as not only to retain the respect of the community, but to give the State a distinguished position in the minds of all thorough students of civil government.

"It must be remembered that in the development of a judicial system sudden changes of a very radical character suggested by logical theories of efficiency are not easily effected, and that, even if adopted, there might follow in practice unexpected and undesirable results from the disturbance of local conditions, traditions and prejudices effected by changes, the reason for which would not be generally understood or agreed upon by the bar or by the public."

We now turn to a more detailed examination of H. 1011.

The proposed administrator in H. 1011 would, in effect, be (or be considered) a dictator, for certainly the Chief Justice of the Supreme Judicial Court or that Court could not devote the necessary time to his supervision and direct and also maintain the high standard of the judicial service of the court. It would seem that the administrator would take over the duties of the Judicial Council, the Administrative Committee of the District Courts and the Administrative Committee of Probate Courts. The existence of those bodies would seem no longer necessary or justified under the proposed bill. One cannot believe that the Chief Justice of the Supreme Judicial Court, or that Court, would rubber stamp the actions of the administrator, and it is doubtful if the Chief Justice, or that Court, could find time to do more than that.

For many years it has been the sound policy of the legislature to relieve that Court of duties, not to add to them. Much of its original jurisdiction is now in the Superior Court.

There are seven paragraphs in the bill specifying the duties of the administrator. Under par. B., he is to determine the need of assistance by any court. Under par. C., it seems to be intended that judges shall be transferred from one court to another. This cannot be done respecting certain courts.

Under par. E he is to prepare budget estimates for the whole judicial system, and under par. F he is to draw all requisitions for payment out of public moneys for the operation of the judicial system. This would interfere with duties of certain judges, clerks of courts and district attorneys who are constitutional officers whose duties cannot be given to other than constitutional officers. It should also affect the duties of County Commissioners.

Under section 29 the Chief Justice of the Superior Court could not assign the Justices without the approval of the Chief Justice of the Supreme Judicial Court.

The administrator is not required to submit his suggestions or budgets to the court or justices concerned, although under the Federal Act this must be done. He is not required to hold hearings. Appropriations for the Judicial branch are made by the Commonwealth and by the 14 counties. The bill could not be effective without amending the Constitution and many statutes. We have no way to estimate the cost of the administrator for the courts and his assistants. There is no limit as to the number of assistants. Note that Sec. 25 mentions "powers and duties vested in him."

Courts Affected by Bill

Supreme Judicial Court—1 Chief Justice, 6 Associate Judges

Superior Court—1 Chief Justice, 31 Associate Judges

District Courts outside of Suffolk 64, with 2 justices in 3 courts, 1 justice in each of the others and at least one special justice in each court, 2 in many courts and 3 in one court. If all vacancies were filled, at the moment there would be 84 special justices in these sixty-four courts.

District Courts in Suffolk

Municipal Courts of Boston, a chief justice, 8 associate justices and six special justices.

Other courts in Suffolk 8—with 9 justices and 12 special justices —at least one in each court.

Juvenile Court Boston 1, 1 justice, 2 special justices

Land Court—3 judges

Probate Courts 14, 23 judges and special judges.

The bill would affect approximately 90 courts and 269 judges.

Judges must comply with requests of administrator for information, etc. If all requisitions for payment for operation of the judicial system must be drawn by the administrator (see F. Sec. 2) would it not be necessary to obtain his approval before any expense is incurred? This would affect judges, appointment of counsel in capital cases, auditors and masters, witnesses, District Attorneys, number of jurors, etc. The bill as submitted could not become effective without constitutional amendment.

Our judicial history and system have differed from those of the Federal system or of New Jersey and many other states in its system of courts and while we need medicine this bill (aside from its details) does not suggest the kind we need at the present time.

Current Problems

As to the Superior Court and its congested dockets, the immediate problem in our opinion, calls not for the creation of the administrator provided in this bill, but for other legislation some of which we have suggested in this and earlier reports.

As to the District Courts, the Council stated in the 8th and again in the 10th report (p. 10) in 1934 "all our judicial history is a picture of the growth of business crowding work downward toward the base of the judicial pyramid . . . and this means that the base line must be prepared to receive the load and handle it satisfactorily".

This is the reason for the current movement to reorganize the district court system with full time judges to improve the work of those courts and the public confidence in them.

The Administrative Committee of the District Courts with its long experience since 1922 and its periodical visits to all of the 72 courts within its field and with its semi-annual circulars of information, suggestions and directions, does more for those courts than any administrator, such as is suggested, could accomplish. The work of that committee is not as fully realized as it should be.

No annual conference of judges provided for in s. 28 of the bill could compare with the work of that committee or with the gradual work of bar committees.

We have discussed the bill at some length because of its origin in serious and well meaning efforts in recent studies.

A minority report by Mr. Dearborn and Mr. Bartlett is hereto annexed.

As usual, the substance of circular letters of the Administrative Committee of the District Court is printed in Appendix A in order to keep the annual information as to the work of those courts and of that committee available for convenient reference.

FRANK J. DONAHUE, *Chairman*
FREDERIC J. MULDOON, *Vice-Chairman*
LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
DAVIS B. KENISTON,
FRANK L. RILEY,
CHARLES W. BARTLETT,
JOSEPH GOLDBERG,
FREDERICK M. DEARBORN, JR.

MINORITY REPORT OF MR. DEARBORN AND MR. BARTLETT ON H.1011

I agree with the action of the Council in voting not to recommend this bill but I do not agree with all the reasons given for this action in the Majority Report. I do not think that an idea which has proved successful in other court systems should be discarded without first being certain that it can be of no value here.

Accordingly, it is the recommendation of the undersigned that further consideration be given to the administrative problems of our courts in order to determine whether the proposal for a court administrator can be adapted to, and is needed in, the administration of justice in the Commonwealth. Mr. Bartlett joins in this minority report.

F. M. DEARBORN, JR.

APPENDIX A

The District Courts

(Other than the Boston Municipal Court)

There are 72 of these courts in addition to the Municipal Court of the City of Boston, and eight of them, besides that court, are in Suffolk County. Their volume of business appears in the table opposite. The history of the discussion of these courts since 1876 appears in the Law Society Journal of February 1945 (also MLQ May 1945, see also list of reports in 20th Report of the Judicial Council, page 29 and pp. 86 and 92 of the 22nd report. See also the report of the current "Survey" Committee in 37 Mass. Law Quar. No. 4, December 1952. As usual the substances of the semi-annual circular letters of the Administrative Committee are reprinted below as they contain helpful information for those practising in these courts, and also a continuous history of the courts and of the work of that Committee. Attention is called to the consolidated index of the earlier letters in the 27th report of the Judicial Council pp. 57-61.

Supplementary to the volume of business for each court in 1952-3, in the table opposite, a five year comparative table appears below.

District Court Business 1948-1953

	1948 to 1949	1949 to 1950	1950 to 1951	1951 to 1952	1952 to 1953
Civil Writs Entered	58,697	55,702	51,499	51,496	54,871
Contract	29,737	30,647	27,881	28,124	31,104
Tort	15,663	14,547	14,917	15,377	16,495
(Ejectment)	12,282	9,715	7,892	7,282	6,572
All Other Cases	1,015	793	809	713	700
Reports to Appellate Division	90	96	84	74	66
Appealed to Sup. J. Court	15	19	12	17	11
Supplementary Process	16,423	18,255	17,664	17,621	18,738
Small Claims	56,166	54,962	54,229	53,572	58,051
Criminal Cases Begun	157,988	155,398	161,897	177,161	194,324
Criminal Appeals	3,462	3,317	3,453	3,251	3,602
Drunkenness	56,696	54,679	52,870	52,557	54,859
Op. under Inf. Int. Liquor	4,197	4,921	5,175	5,542	5,518
Total Automobile Cases	68,522	68,352	69,665	85,293	96,367
Int. Liquor Cases	179	182	206	189	287
Juv. Cases under 17 Years	5,219	4,933	5,116	5,544	6,200

WAY OF THE

STATISTICS OF THE DISTRICT COURTS OF MASSACHUSETTS FROM OCTOBER 1, 1952 TO OCTOBER 1, 1953
AS REPORTED BY THE CLERKS OF SAID COURTS.

Compiled by the Administrative Committee of District Courts

DISTRICT COURT	Civil Writs Entered	Contract	Tort	Summary Process (Ejectment)	All Other Cases	Removals to S. C. (Total of all removals)	Total Motor Tort Cases entered	Total removals of such to Superior Court	Reported to App. Div.	Appealed to S. J. C.	Supplementary Process	Small Claims	Criminal Cases Begun	Criminal Appeals	Drunkenness Total Number of Complaints	Automobile Cases (total)	Operating under influence of intoxicating liquor	Juvenile Cases under 17 years
Central Worcester	3,025	1,857	851	276	41	133	722	53	2	0	1,161	4,036	11,320	97	3,253	3,513	162	405
1st East. Middlesex, Malden	3,873	2,068	1,528	247	30	570	1,371	244	5	1	1,094	2,279	4,643	112	960	2,847	112	180
Springfield	3,061	2,101	647	293	20	153	545	81	0	0	1,375	3,375	19,385	25	5,005	12,107	176	265
Roxbury	2,064	335	447	1,267	15	66	395	59	2	0	829	1,899	15,365	247	5,072	7,344	144	552
3rd East. Middlesex	3,650	1,948	1,301	384	17	238	1,150	169	9	1	827	2,004	9,606	172	2,310	5,833	222	202
Dorchester	1,146	212	575	345	14	106	506	85	1	0	1,694	1,253	4,525	100	1,362	2,366	120	193
East Norfolk, Quincy	2,684	1,726	773	165	20	190	698	98	2	0	634	2,404	4,949	98	1,501	2,308	250	237
Southern Essex, Lynn	2,489	1,273	936	239	41	380	814	282	4	0	817	1,421	4,312	33	1,822	2,032	178	144
3rd Bristol, New Bedford	1,642	828	639	162	13	141	570	101	5	3	251	2,581	4,003	202	1,208	916	208	195
Lowell	1,878	1,054	630	183	11	96	539	73	2	0	476	2,512	3,394	31	1,279	540	101	114
2nd Bristol, Fall River	1,152	597	426	110	19	85	357	40	0	0	125	987	4,063	180	1,656	1,367	170	108
Lawrence	991	447	464	73	7	103	420	75	0	0	88	814	2,583	49	1,348	750	106	86
Somerville	1,802	1,224	498	69	11	113	400	90	6	1	482	914	2,973	85	1,321	915	116	206
First Essex, Salem	1,587	1,094	396	84	13	191	327	123	0	0	353	997	3,048	127	1,145	1,132	171	108
2nd East. Middlesex, Waltham	1,461	904	363	188	6	63	330	38	2	1	336	982	7,546	65	1,067	5,988	154	231
West Roxbury	488	141	146	193	8	32	127	15	1	0	397	982	2,953	104	776	1,630	69	209
North. Norfolk, Dedham	1,150	736	341	52	21	63	303	36	1	0	388	604	1,289	40	371	667	58	60
Newton	1,167	741	359	58	9	65	311	35	4	0	301	654	3,842	48	446	3,094	47	47
Brockton	1,245	706	455	67	17	86	416	64	2	0	344	887	1,966	58	724	633	74	117
Hampshire, Northampton	419	275	100	39	5	30	93	21	0	0	108	1,170	3,011	29	559	1,779	107	27
4th East. Middlesex, Woburn	1,085	726	285	66	8	66	259	40	0	0	457	1,032	1,859	34	728	874	74	72
Chelsea	955	298	483	168	6	116	376	77	1	0	360	1,013	4,536	205	1,524	1,783	81	168
East Boston	619	114	308	182	15	93	270	72	0	0	310	701	3,140	89	670	1,758	32	274
Brighton	436	108	132	193	3	16	113	12	0	0	309	761	4,339	91	929	3,102	41	47
Central Berkshire, Pittsfield	505	378	75	33	19	30	60	8	0	1	181	1,825	3,403	27	510	2,220	69	85
1st Bristol, Taunton	534	299	184	40	11	69	151	42	0	0	92	592	1,782	77	191	1,148	84	61
Brookline	1,310	858	339	82	31	55	301	40	4	0	349	566	3,535	28	214	1,842	24	65

East Boston	619	114	308	182	15	93	270	72	0	0	310	701	3,140	89	670	1,758	32	27
Brighton	436	108	132	193	3	16	113	12	0	0	309	761	4,339	91	929	3,102	41	47
Central Berkshire, Pittsfield	505	378	75	33	19	30	60	8	0	1	181	1,825	3,403	27	510	2,220	69	85
1st Bristol, Taunton	534	299	184	40	11	69	151	42	0	0	92	592	1,782	77	191	1,148	84	61
Brookline	1,310	858	339	82	31	55	301	40	4	0	349	566	3,535	28	214	1,842	24	65
Holyoke	453	274	112	65	2	45	91	26	0	0	97	592	2,604	17	1,601	647	141	46
No. Cent. Essex, Haverhill	613	241	306	48	18	95	263	70	0	0	57	422	1,383	22	704	236	48	23
South Boston	448	59	49	334	6	10	37	5	0	0	124	452	4,111	129	1,820	1,518	45	138
2nd Plymouth, Hingham	850	620	158	54	18	40	138	27	0	0	395	848	1,626	150	615	524	116	71
Chicopee	214	116	40	54	4	15	32	6	0	0	58	377	2,210	11	579	1,260	115	48
Fitchburg	516	361	99	46	10	25	80	4	0	0	345	857	1,909	34	903	552	71	82
1st So. Worcester, Webster	234	163	54	14	3	17	43	8	1	0	47	1,018	2,552	8	396	1,833	70	39
4th Bristol, Attleboro	382	255	92	30	5	30	73	15	0	0	219	843	1,214	30	116	427	79	57
1st. So. Middlesex	847	567	236	39	5	187	205	80	0	0	220	409	2,022	32	461	950	77	70
Central Middlesex, Concord	426	263	140	22	1	26	128	20	0	0	122	359	1,775	26	196	1,331	69	45
West. Norfolk, Wrentham	497	377	95	24	1	25	68	21	1	0	141	543	1,530	13	238	855	68	71
Franklin, Greenfield	254	190	38	19	7	11	26	6	1	0	457	1,190	1,470	12	254	656	65	50
1st. No. Worcester, Gardner	340	248	62	22	8	12	46	6	0	0	273	737	1,220	19	454	544	52	15
East. Essex, Gloucester	415	327	51	30	7	32	43	11	0	0	75	245	912	15	340	240	35	24
1st Barnstable, Barnstable	561	453	61	29	18	18	61	7	1	1	108	652	2,359	49	870	482	125	51
West. Hampden, Westfield	210	148	30	26	6	3	11	3	0	0	63	412	2,389	13	259	1,912	68	47
1st No. Middlesex, Ayer	179	133	39	4	3	9	39	8	0	0	38	354	2,486	54	322	1,570	152	54
4th Plymouth, Wareham	300	227	52	18	3	12	50	6	2	1	80	645	1,406	45	373	697	98	81
3rd Plymouth, Plymouth	328	255	58	13	2	5	49	5	2	0	119	543	876	29	279	266	74	75
2nd So. Worcester	134	98	27	8	1	15	27	7	0	0	8	223	228	8	33	88	7	11
Peabody	338	255	69	13	1	44	66	24	0	0	98	419	1,112	22	521	269	52	22
South. Norfolk, Stoughton	381	281	68	31	1	15	63	10	3	0	134	336	763	34	138	411	55	47
2nd East. Worcester, Clinton	155	89	47	17	2	12	41	11	0	0	108	369	539	6	116	277	13	35
Charlestown	501	67	272	160	2	100	239	82	1	1	148	364	4,858	134	1,758	1,739	31	108
Leominster	213	164	24	20	5	5	24	0	0	0	244	233	678	14	301	176	33	35
Marlborough	340	205	112	20	3	50	103	41	0	0	62	648	754	28	220	281	37	47
North. Berkshire, No. Adams	169	105	16	20	28	3	13	0	1	0	69	442	689	20	223	247	27	28
3rd So. Worcester, Milford	206	118	36	12	40	9	33	3	0	0	189	318	325	5	97	99	10	27
Newburyport	176	113	50	12	1	14	45	8	0	0	44	711	1,457	40	590	547	61	68
Eastern Hampden, Palmer	160	136	17	5	2	2	11	0	0	0	45	328	1,285	2	165	829	67	57
1st. East. Worcester, Westboro	138	83	43	10	2	8	43	6	0	0	38	214	1,161	10	103	838	36	34
Western Worcester	206	166	31	8	1	4	30	2	0	0	63	447	395	14	105	170	27	12
Natick	285	210	60	10	5	21	55	15	0	0	96	211	1,391	33	122	1,093	56	19
2nd Barnstable, Provincetown	224	187	17	18	2	20	16	5	0	0	67	294	967	31	396	296	70	15
2nd Essex, Amesbury	91	46	34	11	0	13	31	7	0	0	17	315	801	11	461	277	39	13
4th Berkshire, Adams	90	60	17	4	9	1	16	1	0	0	9	103	624	2	143	399	28	18
So. Berkshire, Gt. Barrington	128	96	17	15	0	4	15	3	0	0	20	476	514	0	111	274	19	12
Lee	85	40	38	7	0	5	38	2	0	0	13	170	689	5	84	304	35	10
East. Franklin, Orange	93	59	8	5	21	0	8	0	0	0	21	133	261	0	67	117	21	9
East. Hampshire, Ware	35	27	4	4	0	3	4	2	0	0	22	89	115	1	21	51	9	1
3rd Essex, Ipswich	48	35	9	4	0	1	9	1	0	0	12	52	316	5	127	111	31	5
Winchendon	57	32	12	5	8	3	10	1	0	0	8	97	206	2	67	62	14	7
Williamstown	41	25	7	2	7	3	7	3	0	0	3	88	446	3	47	342	12	2
Dukes, Edgartown	69	61	6	2	0	0	4	0	0	0	23	195	183	9	45	61	4	11
Nantucket	23	21	1	0	1	0	0	0	0	0	1	33	143	2	67	21	6	2
Total	54,871	31,104	16,495	6,572	700	4,321	14,358	2,641	66	11	18,738	58,051	194,324	3,602	54,859	96,367	5,518	6,200

ADDITIONAL INFORMATION

Neglected Children	615	Drunkenness releases by probation officers	27,609
Inquests held	45	Insane Commitments	5,763
Parking tickets returned to Clerks' offices	502,733	Intoxicating Liquor cases	287

Total Motor Cases Entered	13,477	12,456	12,901	12,985	14,358
Total Motor Cases Removed	3,065	2,585	2,502	2,667	2,641
Neglected Children	795	593	526	555	615
Inquests held	76	—	55	53	45
Parking Tickets returned to Clerk's Offices	298,217	364,080	419,582	513.745	502,733
Drunkenness Releases by Probation Officers	28,932	27,950	26,391	26,702	27,609
Insane Commitments	5,938	5,447	5,686	5,615	5,763
Total of All Removals to Superior Court					4,321

Compare with entries and motor case removals above.

ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

Circular Letter of January 8, 1953

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:

(Following the five year comparative table from 1947-8-1951-2 the letter continued.)

Civil Writs Entered is almost identical, there being 51,496 for the past year and 51,499 for the previous year. The actions of contract entered have increased from 27,881 to 28,124 and the actions of tort have increased from 14,917 to 15,377 but this increase has been almost offset by the decrease in the entry of summary process cases, commonly called ejectment, from 7,892 to 7,282. The decrease in the entry of summary process cases would seem to indicate that the housing situation is generally improving although in some of the Suffolk County Courts, the entry of this type case seems to be slightly increased. The number of cases reported to the Appellate Division decreased from 84 to 74 but there was an increase in the number of such cases appealed to the Supreme Judicial Court from 12 to 17. The number of supplementary process cases is practically the same, being 17,664 for the year 1951 and 17,621 for 1952. There has been a slight decrease in the number of small claims, there being 53,572 for the past year and 54,229 for the previous year. The number of criminal cases begun has increased from 161,897 to 177,161. This increase is partly caused by a difference in the method of listing cases but principally by the parking violations upon which criminal complaints have been made by reason of the failure of motorists to take advantage of the non-criminal disposition of parking regulations. This is evident from the fact that the total automobile cases entered were 85,293 as against 69,655 for the previous year. There was an increase of 15,264 criminal cases begun and an increase of 15,638 total automobile cases. The increase in the number of parking meters in the various cities has undoubtedly contributed to the increase in the total number of automobile cases begun notwithstanding the fact that 513,743 parking tickets were returned to the clerk's offices as against 419,582 for the

previous year. In spite of the large increase in the number of criminal cases begun the number of appeals in criminal cases has decreased from 3,453 to 3,251. The operating under the influence of intoxicating liquor cases increased from 5,175 to 5,542 and the comparison of figures for the past five years shows a gradual increase in this type case. It must be borne in mind, however, that there has been a great increase in the number of automobiles on the road and the number of miles driven by motorists during the past few years. There has been a gradual decrease in the complaints for drunkenness during the five year period, the decrease in the last two years being small as there were 52,557 cases for the past year as against 52,870 for the previous year. The number of drunkenness releases by probation officers has increased slightly from 26,391 to 26,702. The intoxicating liquor cases, complaints for violations of the alcoholic liquor statute, have dropped from 206 to 189. There has been an increase in juvenile cases from 5,166 for the year 1951 to 5,544 for the past year. This latter figure is the largest number of juvenile cases for the past five years and may indicate that the problem of juvenile delinquency has not been entirely solved. There has also been a slight increase in the number of neglected children, there having been 555 for the past year and 526 for previous year. The number of inquests has decreased from 55 to 53 and the number of insane commitments has decreased from 5,686 to 5,615. The total number of motor tort cases entered and the total number removed remain about the same, there being 12,985 such cases entered during the past year and 12,901 for the previous year of which 2,667 were removed to the Superior Court during the past year and 2,582 for the previous year.

REPORT OF THE DISTRICT COURT SURVEY COMMITTEE

The District Court Survey Committee comprising officials of the various law schools within the Commonwealth has filed its report together with an Act embodying its recommendations, which Act we understand will be Senate No. 247. The Act contemplates eventually full time service for all judges of the district courts with a present extension of the number of full time courts without interfering with the present judicial personnel except in the matter of its duties.

The Administrative Committee has cooperated with the Survey Committee in furnishing it all the information that it has requested and in giving it the benefit of its experience with the set up and problems of the various district courts. Other than to say that the purposes sought to be accomplished by the bill are desirable, we feel that we should make no further comment in reference to the report and the accompanying bill at this time.

SIMULTANEOUS SESSIONS

Ordinarily we would publish the pamphlet containing the number of simultaneous sessions allotted to each court and the list of special justices assigned to each court which was last published in January, 1951 effective as of January first of that year. However, by reason of the pending legislation which

might render such assignments and number of sessions obsolete, we have decided is not feasible to publish the pamphlet at this time.

There have been only occasional requests for additional simultaneous sessions during the past few years, all of which seemed to be justified by unusual circumstances and as in the past, the Committee will always give the matter of increasing the allotments attention and consideration.

The Third District Court of Eastern Middlesex has now been added to the three courts having two full time judges. The courts are the District Court of Springfield, Central District Court of Worcester and the Municipal Court of the Roxbury District. The number of simultaneous sessions that might be held in the latter three courts was established as one hundred (100) for the calendar year 1952 and the Third District Court of Eastern Middlesex is now added to this list so that the number of simultaneous sessions that may be held in these four courts for the calendar year 1953 is established at one hundred (100).

The number of simultaneous sessions that may be held in each of the other courts for the calendar year 1953 is established by the Committee to be the same number as established for the calendar years 1951 and 1952 subject in all cases to further change for unusual and adequate cause.

In view of the frequency with which special justices have been called on short notice or in an emergency, judges and clerks should be careful to observe the provisions of G. L. Chapter 218, Section 40 as follows:

> "When a special justice holds the court or a session thereof or an inquest, or certifies a bill of costs to a county, city or town treasurer, that fact, and the fact which gave him jurisdiction, shall be entered upon the general records of the court, but need not be stated in the record of any case heard by him."

This is important particularly in a criminal case. Commonwealth Vs. Fay, 151 Mass. 380; Commonwealth Vs. Connor, 155 Mass. 134; Commonwealth Vs. Brown, 158 Mass. 168.

RECENT DECISIONS OF THE SUPREME JUDICIAL COURT

Since our last circular letter the Supreme Judicial Court has handed down the following decisions which are of interest to district court officials.

(Summaries omitted) [*329 Mass. 440*]

Mead Vs. Coca Cola Bottling Company, 1952 A. S. 1031. (329 Mass. 440).

Mullaney Vs. White, 1952 A. S. 1057. (329, 464.)

Smith Vs. Hiatt et al., 1952 A. S. 1087. (329 Mass. 488.)

Gentile Vs. Director of the Div. of Employment Security, et al, 1952 A. S. 1101. (329 Mass. 500.)

RULES, REQUIREMENTS AND STATUTES RELATING TO PRACTICE OF LAW BY CERTAIN COURT OFFICIALS

As we have frequent inquiries in reference to this subject matter and the rules and requirements are sometimes not readily available, we are reprinting them here for the convenience of those who may be concerned therewith.

The Supreme Judicial Court established as of June 30, 1952 the following general rule numbered 2 and headed "Administration of Justice":

> "(1) No justice, special justice, clerk or assistant clerk of a District Court shall be retained or employed or shall practice as an attorney on the criminal side of any court in the Commonwealth.
>
> (2) No special justice of a District Court shall be retained or employed or shall practice as an attorney on the civil side of his court. This paragraph shall not be applicable to a special justice of any District Court where the population of the district, according to the last preceding State or national census, shall be less than twelve thousand."

Paragraph 1 of this rule was adopted by the Supreme Judicial Court on December 7, 1935 and paragraph 2 was first promulgated on March 1, 1937. Paragraph 2 of the present rule substitutes the word "his" before the word "court" in the third line thereof for the word "that" in the similar place in the original rule. This change tends to clarify paragraph 2 of the rule. According to the 1950 national census, the District Court of Williamstown, the District Court of Dukes County, the Third District Court of Essex (Ipswich), the District Court of Eastern Franklin (Orange), the District Court of Eastern Hampshire (Ware), the District Court of Nantucket and the District Court of Winchendon come within the exception provided for in paragraph 2.

Following are the requirements promulgated by the Administrative Committeee of District Courts:

> "REQUIREMENT NO. V.
>
> (Effective January 1st, 1943)
>
> On and after the effective date hereof, no Special Justice shall be assigned to hear or try a motor tort case if he shall be directly or indirectly retained, employed or practice as an attorney in motor tort cases."
>
> "REQUIREMENT NO. XVII.
>
> (Effective January 1st, 1944)
>
> On and after the effective date hereof, no Justice of a District Court other than the Municipal Court of the City of Boston shall hear or try a motor tort case in any District Court of the Commonwealth if he shall be directly or indirectly retained, employed or practice as an attorney in motor tort cases."

G. L. Chapter 218, Section 17 provides as follows:

> "A justice, clerk or assistant clerk of a district court shall not be retained or employed as attorney in an action, complaint or proceeding pending in his court, or which has been examined or tried therein; and a special justice shall not be so retained or employed in any case in which he acts or has acted as justice."

G. L. Chapter 218, Section 77A provides that the justices and clerks of the District Court of Springfield, Central District Court of Worcester, District Court of East Norfolk, Municipal Court of the Roxbury District, First District Court of Eastern Middlesex, Third District Court of Eastern Middlesex and the Second District Court of Bristol shall devote their entire time during ordinary business hours to their respective duties and shall not, directly or indirectly, engage in the practice of law.

In Collins Vs Godfrey, 324 Mass. 574, the court sustained the validity of its rule relating to practicing on the criminal side of any court in the Commonwealth. It said at page 580:

> "The plaintiff cannot maintain his further contention that the rule does not apply to advice given in his office without appearing in court. It is well settled that the giving of legal advice and office practice in general are included within the practice of law. ***When such advice or practice relates to criminal cases it is 'practice as an attorney on the criminal side' of a court within the meaning of the rule. The reason for the rule extends to such practice."

NEW JUDGES AND VISITATIONS TO THE COURTS

In recent months an unusual number of jusices and special justices have been appointed to fill existing vacancies. Many of them have been contacted by the Committee with an offer of assistance and we have had several inquiries from them in reference to problems connected with their official duties which we have answered. We wish to take this opportunity to formally welcome them to the bench of the district court and to let them know that we will be glad to render any assistance we can in matters relating to district court problems and procedure. We hope to meet them all during our visits during the coming year.

For the first time we have been able to visit all the courts in the system during one calendar year and depending upon our appropriation for expenses, we will endeavor to continue this practice. There is no substitute for personal contact and acquaintance by the Committee with the various court officials who share with us the common purpose of improving the efficiency of the district court system and making the performance of the sometimes difficult and unpleasant duties as smooth and agreeable as possible.

While generally the practice throughout the district courts from a legal aspect should be uniform, there are always local and unusual conditions that must be considered which the Committee has appreciated and dealt with accordingly. We are grateful for the courtesy and consideration that has been

shown by all the court officials and trust that they will continue to feel, as we believe they now do, that the only object of our Committee is to be helpful.

FRANK L. RILEY, Chairman
KENNETH L. NASH
LEO H. LEARY
ERNEST E. HOBSON
ARTHUR L. ENO

ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

Circular Letter of August 15, 1953

To the Justices, Clerks and Probation Officers of the District Courts:

As the Legislature prorogued earlier than it has for several years, we are able to issue our mid-year circular letter more seasonably than it has been expedient to do so for some time past.

The following Acts of 1953 affect directly or indirectly practice in the district courts and we suggest that they be read by all the court officials.

Chap. 89. This Act provides that the maximum fee to be charged by any person authorized to take bail in the case of a person arrested for any misdemeanor shall be $3.00.

Chap. 96. This Act increases the fees of magistrates for examination of sureties, approval of bonds, and taking of recognizances.

Chap. 106. This Act extends the rights of the summary process law to owners of land where a purchaser under a written agreement to purchase is in possession of the land or tenements beyond the date of the agreement without taking title to said land as called for by said agreement.

Chap. 163. This Act is entitled "An Act further regulating the dismissal of complaints in illegitimacy cases." It amends Section 17 of Chapter 273 of the General Laws by adding a new provision to said section whereby a court, if it becomes satisfied "that it is for the best interests of the child", may dismiss the case and vacate any adjudication of paternity. Before this section was amended it provided that if the court certified that adequate provision had been made, no further prosecution should be made under sections 11 to 19, inclusive of said chapter. As amended, the Act provides that no further prosecution shall be maintained under any of said sections if the court certifies that it is for the best interests of the child. We therefore suggest that in all cases it be stated that the court certifies that it is for the best interests of the child when dismissing an illegitimacy complaint.

Chap. 168. This Act increases the ad damnum in civil cases under small claims procedure from $50.00 to $75.00. It was approved March 12, 1953. By Chapter 277, which was an emergency Act, approved April 22, 1953, Chapter 168 became effective on July 1st.

Chap. 169. This is an Act relative to defences in actions for false arrest or imprisonment. It adds a new section, 94A, to Chapter 231 of the General Laws, and provides that "if a person authorized to make an arrest shall have probable cause to believe that a misdemeanor for which he may make an arrest is being committeed in his presence, such probable cause shall be a defence in an action brought against him for false arrest or imprisonment."

Chap. 242. This is an Act relative to the admissibility in evidence of certain written statements, and amends Section 23A of Chapter 233 of the General Laws, by adding at the end of said section "or within such further time as the court may allow on motion and notice."

Chap. 249. This is an Act entitled "An Act relative to the non-criminal disposition of parking violations". This Act took effect May 1, 1953. The changes in the law are too numerous to discuss here. Therefore the Act should be carefully read by court officials.

Chap. 299. This Act provides for a separate penalty for an indecent assault on a child, and adds new Section 13B to Chapter 265 of the General Laws. It provides that whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished by imprisonment in the state prison for not more than five years, or in jail for not more than two and one-half years, or by a fine of not more than $500.00.

Chap. 319. This Act abolishes the position of trial justice and takes effect on October 1, 1953.

Chap. 364. This Act provides for sick leave for probation officers in District Courts.

Chap. 366. This is an Act relative to service of process in certain cases under the motor vehicle law.

Chap. 434. This is an Act entitled "An Act relative to rent control." The Act is too long to be discussed here, and we recommend that it be carefully read.

Paragraph (b) of Section 6 of the Act provides that the district court within which is located the controlled housing accommodation concerned shall have exclusive original jurisdiction of actions arising out of the provisions of Section 7 of the Act.

This was an emergency law and became effective upon approval June 2, 1953.

Chap. 463. This Act defines "non-resident" as used in the laws pertaining to motor vehicles and authorizes the registrar to make certain determinations with respect thereto.

Chap. 478. This Act authorizes the Director of the Division of Fisheries and Game to make rules and regulations relating to the taking of certain fish.

Chap. 480. Same relating to the hunting of deer.

Chap. 481. Same relating to hunting and taking of gray squirrels, hares and rabbits.

Chap. 482. Same relating to the hunting and trapping of mammals.

Chap. 485. This Act extends the benefits of the present eviction laws relating to extensions of time to the surviving spouse, parents or children of a deceased tenant at will.

Chap. 505. This Act relates to the support of minor children by their parents. It amends Section 8 of Chapter 273 of the General Laws by adding at the end of the following sentence, "The legal duty of the parent or parents to support a minor child shall continue notwithstanding the absence of a court decree ordering them or either of them to pay for the support of said child and notwithstanding any court decree granting custody of such child to another; provided, however, that where decree stipulates an amount to be paid by them or either of them for said child's support they shall not be obligated in excess of that amount." This amendment definitely settles some of the questions raised by the decision in Broman vs. Byrne, 322 Mass. 578.

RECENT DECISIONS OF THE SUPREME JUDICIAL COURT

The following decisions of the Supreme Court covering questions that may arise in the district courts have been handed down since our last circular letter.

NEIL VS. HOLYOKE STREET RAILWAY COMPANY, 1952 A. S. 1193.

This case should be carefully read. It contains an excellent discussion of when violation of law is evidence of negligence or is an act of negligence, and the rights and obligations of operators of police and fire vehicles upon highways.

FORCIER VS. HOPKINS, 1953 A. S. 93.

In this case the court held that the record of a conviction in a case where a sentence was imposed and the execution thereof suspended was properly admitted to affect the credibility of a witness.

ROCKLAND-ATLAS NATIONAL BANK OF BOSTON VS. MURPHY, 1953 A. S. 189.

This was an action of contract by which the plaintiff sought to recover an unpaid balance due on a three hundred dollar promissory note, plus interest and attorney's fee, as provided in the note. The trial judge found that the loan was made under Section 90 of Chapter 140 of the General Laws, and the Supreme Court held that the plaintiff was not entitled to recover an attorney's fee, inasmuch as said Section 90 determined and limited what should be charged for the use of the money. It might be well for judges to read in this connection the case of Leventhal Vs. Krinsky, 325 Mass. 336, where it was held, where there was no statutory provision against it, a reasonable attorney's fee could be collected.

ROSARIO VS. VASCONCELLOS, 1953, A. S. 385.

This case contains an excellent discussion of what constitutes gross negligence in the operation of a motor vehicle.

ALBES VS. BOULANGER, 1953 A. S. 435.

In this action of contract the judge found for the defendant. The Court says, "The sole question of law now argued by the plaintiff arises out of the manner in which the judge dealt with the defendant's first request which reads, 'There is no evidence upon which the court can base a finding for the plaintiff'. Since the judge took no action on this request, it must be treated as having been denied. But this ruling, instead of harming the plaintiff, as he seems to argue, was favorable to him, and, in view of the evidence, was the only one that could properly have been made; it was not inconsistent with the finding for the defendant."

BROWN VS. SANDLER, 1953, A. S. 432.

In this case the Court says, "It is settled that under a declaration with an account annexed the plaintiff may recover money due under a special contract that has been fully performed."

SINGARELLA VS. CITY OF BOSTON, 1953 A. S. 499. (trustee process)

ROONEY VS. LUDLOW MFG. & SALES SOCIAL & ATHLETIC CLUB, INC., 1953 A. S. 11. (Snow and ice notice.)

COMMITMENTS TO THE REFORMATORIES FOR THE CRIME OF LARCENY

We reprint herewith copy of a letter which was sent to all the clerks of the district courts on April 13, 1953.

The Honorable Reuben L. Lurie, Commissioner of Correction, has requested our cooperation in the matter of clarifying commitments to the Massachusetts Reformatory and the Massachusetts Reformatory for Women for the crime of larceny. As you know, G. L. Chapter 279, Section 37 provides that every warrant for the commitment of a person sentenced by a district court or a trial justice shall set forth the statutory name, if any, of the crime for which the person was committed, and shall contain a citation of the statute, if any, under which the complaint was drawn. G. L. Chapter 279, Section 18, as amended by the Acts of 1951, Chapter 134, provides that a female sentenced to the reformatory for women for larceny of property exceeding $100 may be held therein for not more than five years and if sentenced to said reformatory for larceny of property not exceeding $100, she may be held therein for not more than two years. A similar provision with respect to sentences to the Massachusetts Reformatory for the crime of larceny appears in G. L. Chapter 279, Section 33, as amended by the Acts of 1952, Chapter 90.

It is essential that the authorities of these institutions should know at the time of commitments thereto for the crime of larceny the maximum period of the indeterminate sentence in each case. Accordingly, will you kindly see that in commitments to these two institutions for the crime of larceny the mittimus made out in accordance wih G. L. Chapter 279, Section 37 reads as follows:

"Larceny of property of a value exceeding $100" or

"Larceny of property of a value *not* exceeding $100"

as the case may be with appropriate citation of the statute under which the complaint was drawn. It is also essential that the provisions of G. L. Chapter 279, Section 35 respecting a copy of the complaint and other information should be furnished with the mittimus on conviction of felonies.

The Committee and other officials concerned will greatly appreciate your cooperation in carrying out the foregoing provisions of the statutes.

ASSIGNMENT OF COUNSEL IN CAPITAL CASES

As a result of conferences with a Committee of the Boston Bar Association on the assignment of counsel and the Rules Committee of the Superior Court on May 15, 1953 the Committee promulgated Requirement No. XVIII and sent a copy thereof to all of the justices, special justices and clerks of the district courts except the Municipal Court of the City of Boston. The Requirement is printed below.

REQUIREMENT NO. XVIII

(Effective May 15, 1953)

PROCEDURE REQUIRED IN CAPITAL CASES

Whether or not a defendant is represented by counsel a plea of guilty should not be accepted by the court in a capital case. If a defendant is not represented by counsel, he should be advised by the court of his right to be so represented and of his right to petition the Superior Court for the assignment of counsel to represent him. A petition, of which the following is a copy, should forthwith be presented to the defendant for his signature before any further proceedings are taken in the case.

COMMONWEALTH OF MASSACHUSETTS

ss. District Court of

COMMONWEALTH

VS

PETITION FOR ASSIGNMENT OF COUNSEL

Now comes the Defendant in the above entitled case and says that

1. he is charged with a capital crime;
2. he does not waive examination in the District Court;
3. he is unable to procure counsel.

WHEREFORE he prays that

1. the clerk of the District Court or trial justice certify the charge to the Superior Court, and
2. the Superior Court assign counsel for him (her) in the District Court under G. L. (Ter. Ed.) Chapter 276, Section 37A.

Upon the signing of the petition by the defendant, the clerk of the district court shall forthwith transmit the same to the clerk of the Superior Court in his county and the examination continued until the assignment of counsel has been made and certification thereof received by the clerk of the district court

or until said petition has otherwise been disposed of in accordance with the provisions of G. L. Chapter 276, Section 37A.

PLATES ON NON-RESIDENT SEMI-TRAILERS

We have been asked for an interpretation of G. L. Chapter 90, Sections 3 and 6 as they apply to the privilege of drawing a semi-trailer in this Commonwealth by a non-resident owner without a registration plate on said semi-trailer. The question is directed specifically to such vehicles from the state of Tennessee. It appears that under the law of that state semi-trailers are not required to be individually registered or to have plates attached thereto but that the semi-trailer is deemed to be registered when attached to the tractor which does bear plates. Under the law of this Commonwealth the semi-trailer as well as the tractor is required to be registered and bear a plate.

In G. L. Chapter 90, Section 1 a trailer is defined as "a vehicle used for carrying passengers or personal property and having no motive power of its own, but which is drawn by, or used in combination with, a motor vehicle", and semi-trailer is defined as "a trailer so designed and used in connection with a tractor that some part of the weight of such trailer and that of its load rests upon, and is carried by the tractor", and semi-trailer unit as "a motor unit composed of a tractor and a semi-trailer". In other words a semi-trailer unit is a combination of two vehicles, that is, a trailer drawn by a motor vehicle.

> G. L. Chapter 90, Section 3 provides, with certain exceptions that "a motor vehicle or trailer owned by a non-resident, who has complied with the laws relative to motor vehicles and trailers, and the registration and operation thereof, of the state or country of registration, may be operated on the ways of this commonwealth without registration under this chapter, to the extent, as to length of time of operation and otherwise, that, as finally determined by the registrar, the state or country of registration grants substantially similar privileges in the case of motor vehicles and trailers duly registered under the laws and owned by residents of this commonwealth;"

We are informed that the Registrar of Motor Vehicles has made no determination that would permit the operation of a trailer or semi-trailer in this Commonwealth without plates attached thereto although the tractor to which such trailer is attached may be duly registered in the state of Tennessee.

In addition to the so-called reciprocity clause in section 3 above set out, the following provision appears in section 3:

> "Every such vehicle so operated shall have displayed upon it number plates, substantially as provided in section six, bearing the distinguishing number or mark of the state or country in which such vehicle is registered, and none other except as authorized by this chapter."

The said section 6 provides for the conspicuous display on the vehicle of number plates furnished by the Registrar except as provided in section 3 which permits the display of plates properly issued by another state or country.

In view of the fact that no determination has been made by the Registrar of Motor Vehicles permitting the operation of a trailer or semi-trailer without plates, the tractor of which is registered in the state of Tennessee, it is our opinion that such vehicle, when operated in this state, is required to have plates attached thereto, either those of the state of Tennessee or the Commonwealth of Massachusetts, notwithstanding that under the Tennessee law such vehicle is not required to bear plates when attached to a tractor that bears plates of the state of Tennessee duly issued by the authorities of that state when operated in that state.

FILING CASES ON PAYMENT OF COSTS

Recently, we have received criticism respecting the filing of a criminal case by a special justice on the payment of costs. It appears that the judge accepting a plea of nolo, in a case in which a large minimum fine was prescribed by statute, upon the payment of costs in a substantial amount but much less than the minimum fine set out in the statute. It has long been the practice in this Commonwealth to file a criminal case upon payment of costs after a verdict of guilty in a criminal case when the court is of the opinion that public justice does not require a sentence. Commonwealth Vs. Dodwican's Bail, 115 Mass. 133 at 136. It has also been customary to follow the same procedure when a defendant pleads guilty or nolo contendere. A case cannot be placed on file, however, without the consent of the defendant. Marks Vs Wentworth, 199 Mass. 44. While the costs imposed are theoretically the costs of the prosecution, they have not always been strictly defined in the statute. The imposition of costs of prosecution as a part of or in addition to a sentence upon a defendant found guilty seems to have been authorized although not specifically provided for by statute. Wilde Vs. Commonwealth, 2 Metcalf 408 at 412. Harris Vs Commonwealth, 23 Pick. 280. However, Chapter 328, Section 1 of the Acts of 1890 first set out in some detail the items that should be included in the expenses of prosecution. This Act was re-enacted without substantial change in R. L., Chapter 221, Section 6 and in G. L. (Ter. Ed.) Chapter 280, Section 6 where it read as follows:

> "Before imposing a fine as a penalty or part penalty for a crime, the court or justice shall determine the reasonable and actual expenses of the prosecution, including the services of officers and witnesses, the detention and support of the defendant and the expense of serving a mittimus or other warrant of commitment; and may impose a fine, not exceeding the maximum fine prescribed for the crime, which shall include the whole or any part of the amount of the expenses so found and determined. If the presiding justice is of opinion that the maximum fine is an inadequate penalty for the crime committed, he may impose such maximum fine and order the defendant to pay the whole or any part of the expenses of the prosecution. Defendants who pay such expenses after commitment shall also pay the expense of commitment."

It remained in this form until Chapter 251 of the Acts of 1937 which struck out Section 6 as appearing in the Tercentenary Edition and inserted thereof the following:

> *Sec. 6.* "Costs shall not be imposed by the court or justice as a penalty or part penalty for a crime; provided, that the court or justice may, as a condition of the dismissal or filing of a complaint or indictment, or as a term of probation, order the defendant to pay the reasonable and actual expenses of the prosecution, as determined by it or him."

Consequently, the court or justice is now authorized to order the defendant to pay the reasonable and actual expenses of the prosecution as determined by it as a condition of the dismissal or filing of a complaint or as a term of probation. The duty is placed upon the court to determine the reasonable and actual expenses of the prosecution. Some assistance in this determination may be gained by the provisions of G. L. Chapter 280, Section 6 before the amendment set out above. It is to be noted that the reasonable and actual expenses of the prosecution included the services of officers and witnesses, the detention and support of the defendant and the expense of serving a mittimus or other warrant of commitment. The judge should, therefore, as nearly as possible, arrive at the actual expense of the prosecution and should not arbitrarily impose as costs a fictitious amount.

The power of the district court to place cases on file is derived from G. L. Chapter 218, Section 38 which permits such procedure except the filing of a complaint for a felony against a person who has previously been convicted of a felony or has had such a complaint placed on file or unless such filing is prohibited by other provisions of law relative to the filing of complaints for particular crimes.

AN IMPORTANT NEW REQUIREMENT

Since January 1, 1943 it has been provided by Requirement No. V of the Committee that "no special Justice shall be assigned to hear or try a motor tort case if he shall be directly or indirectly retained, employed or practice as an attorney in motor tort cases."

Since January 1, 1944 it has been provided by Requirement No. XVII of the Committee that "no justice of a District Court other than the Municipal Court of the City of Boston shall hear or try a motor tort case in any District Court of the Commonwealth if he shall be directly or indirectly retained, employed or practice as an attorney in motor tort cases."

For some time we have felt that we should invoke the power vested in us by G. L. Chapter 218, Section 43A as amended by Chapter 101 of the Acts of 1945 which authorized the Committee to prohibit the practice of motor vehicle tort cases, so-called, by the justices of the district courts except the justices of the Municipal Court of the City of Boston. We have delayed action due to the pending in the Legislature of Senate Bill 247 filed in conjunction

with the report and survey of the Law School Committee which bill would have effectually taken care of the situation. As this bill, after several amendments, was defeated in the House and the whole subject matter has been referred to a commission for further study, we feel it our duty to act now.

In some counties it is most difficult to secure trial of a motor vehicle tort case due to the fact that both the presiding justices of the courts and the special justices appointed thereto practice in that field. Accordingly it has been necessary to assign to such courts, sometimes on short notice, special justices from other counties and from a considerable distance to hear motor vehicle tort cases. This procedure is very troublesome on many occasions and is inconvenient and unfair to litigants and their attorneys. Parties ordinarily ought not to be prevented from a hearing of their cases by the voluntary, absolute disqualification of the judge before whom their cases arise in regular statutory course.

Accordingly, Requirement No. XVII which became effective January 1, 1944 is hereby rescinded and the following Requirement promulgated in place thereof.

REQUIREMENT NO. XVII

(Effective January 1, 1954)

On and after the effective date hereof no Justice of a District Court other than the Municipal Court of the City of Boston shall practice in motor vehicle tort cases, so-called.

A copy of this new Requirement is being sent to each justice of the district courts except the Justice of the Municipal Court of the City of Boston although from the answers to a questionnaire sent by the Committee to all the justices, it appears that only twenty-three of the present seventy-five justices practice in the motor tort field.

The effect of Requirement No. V and the new Requirement No. XVII is this: On and after January 1, 1954 the justices of the district courts other than the Municipal Court of the City of Boston, commonly but inaccurately called standing or presiding justices, are prohibited from practicing in motor vehicle tort cases, so-called. No change is made in the status of special justices who are not prohibited from so practicing but if they do, then under Requirement No. V they cannot be assigned to hear or try motor vehicle tort cases.

Because many special justices are disqualified from hearing motor vehicle tort cases by this Requirement and other sufficient reasons, the Committee has been liberal in its assignment of special justices to the various courts under the authority given it by G. L. Chapter 218, Section 43A to regulate the assignment of special justices, to determine the number of simultaneous sessions which may be held and the sittings of special justices. However, the Committee feels and recommends that when a justice has occasion to call a special justice for service, he should give preference to the special justice appointed to his court if such special justice is available for service and is not disqualified for service under Requirement V or some other sufficient reason.

The Committee hopes to resume its visitations of the courts soon after the close of the vacation season.

FRANK L. RILEY, Chairman
KENNETH L. NASH
LEO H. LEARY
ERNEST E. HOBSON
ARTHUR L. ENO

TRIAL JUSTICES

(Abolished as of October 1, 1953)

By Chapter 319 of the Acts of 1953, effective October 1, 1953, the position of trial justice was abolished. Hereafter their business will be handled by the District Court for the district in which the towns are located.

WORK OF TRIAL JUSTICES

REPORTED TO THE ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

October 1, 1952 to October 1, 1953

	Criminal Cases Begun	Criminal Appeals	Drunkenness	Drunkenness Releases	Automobile Cases	Juveniles under 17 yrs.
North Andover ..	3	0	3	3	0	0
Andover	26	0	0	0	0	0
Nahant—NO RETURN						
Marblehead	131	0	80	50	43	0
Saugus	291	3	102	100	152	31
Hopkinton	10	0	0	0	0	0
Hudson—NO RETURN						
Hardwick	12	0	1	0	11	0
Barre	43	1	4	1	32	0
Ludlow	158	0	31	0	113	0

By St. 1947 Chapter 343 civil jurisdiction of claims up to $50.00 under the small claims procedure was extended to the Trial Justice in the town of Barre. Fifty-eight (58) such cases have been entered for the above period.

APPENDIX B

STATISTICAL INDEX

APPENDIX C

SUMMARY OF THE WORK ACCOMPLISHED BY THE VARIOUS COURTS

The act creating the Judicial Council (reprinted at the beginning of this report) provides that the Council shall study "the work accomplished and the results produced by the judicial system and its various parts" and "shall report annually upon the work of the various branches."

The annual periods reported by the different courts are not the same, some reporting for the last calendar year while others report from June 30 to June 30, or from September 1 to September 1, etc. The details as to counties appear below.

During the court year September 1, 1952, to August 31, 1953, the Supreme Judicial Court decided 200 cases[1] with opinions and 20 cases by rescripts, not accompanied by opinions, as shown by the table below. There was also one advisory opinion. These opinions are reported beginning 329 Mass. 257 and ending 330 Mass. ——.

Geographical Distribution of Full Bench Cases

	Opinions	*Rescripts only*
Barnstable	4	
Berkshire	4	1
Bristol	15	2
Dukes County	1	
Essex	15[2]	
Hampden	17	
Hampshire	2	1
Middlesex	35[3]	1
Nantucket	1	
Norfolk	7	1
Plymouth	5	2
Suffolk	79	10
Worcester	15	2

Dissenting opinions:

Lewis v. Commonwealth, Mass. Adv. Sh. (1952) 1037; 329 Mass. 445.

Clark v. A & J Transportation Co. Inc., Mass. Adv. Sh. (1953) 593; 330 Mass. 327.

[1] Where one opinion covered more than one case, it has been counted as one case.

[2] In addition, one case originating in Essex County was decided with a companion case originating in Suffolk County.

[3] In addition, one case originating in Middlesex County was decided with a companion case originating in Suffolk County.

The table of full-bench cases from 1875 to 1939 appears on p. 71 of the 15th Report. The usual table of Supreme Court business, other than full-bench cases, with more detailed statements from Suffolk county appears below.

SUPREME JUDICIAL COURT ENTRIES FOR ALL COUNTIES

FOR THE YEAR BEGINNING SEPTEMBER 1, 1952, THROUGH AUGUST 31, 1953

(Not including full bench cases)

	Equity	Transferred to Superior Court	Referred to Masters or Auditors	Prerogative Writs	Petitions for Admission to Bar	Other Proceedings
Barnstable	—	—	—	—	—	—
Berkshire	1	1	—	16	—	—
Bristol	1	—	—	—	—	1
Dukes	—	—	—	—	—	—
Essex	1	1	—	1	—	6
Franklin	—	—	—	—	—	—
Hampden	1	1	—	1	—	3
Hampshire	—	—	—	—	—	—
Middlesex	3	—	—	3	—	1
Nantucket	—	—	—	—	—	—
Norfolk	—	1	—	—	—	—
Plymouth	—	—	—	—	—	7
Worcester	1	—	—	2	—	—
Totals	8	4	—	23	—	18

SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK

FROM SEPTEMBER 1, 1952 TO SEPTEMBER 1, 1953

Transferred to Superior Court	Prerogative Writs	Petitions for Admission to the Bar
15	43	1,112

Law Docket

Appeals from decision of Appellate Tax Board		21
Petitions for Admission to the Bar		1,112
Petitions for Writ of Certiorari		6
Petitions for Writ of Error		9
Petitions for Writ of Habeas Corpus		14
Petitions for Writ of Mandamus		13
Petitions for Discharge under G. L. c. 123, s. 91		2
Petition for Writ of Prohibition		1
Petition for Stay of Execution		1
Informations in the nature of Quo Warranto		2
		1,181
Total Entries on Law Docket	*1,181*	

Equity Docket

Petition for Declaratory Judgment		1
Bills of Complaint		14
Bills in Equity		5
Petitions for Dissolution under G. L. c. 155, s. 50A (About 5,590 corporations)		4
Petitions for modification of decree of Superior Court		2
Petitions for suspension of decree of Superior Court		5
Petitions for suspension of compensation payment pending appeal		2
Petition for Stay of Proceedings pending appeal		1
Petition for transfer of Church Property		1
Petition for Instructions		1
Petition for Authorization to sell real estate		1
Petition for appointment of a member of the Franklin Foundation		1
Petition under G. L. c. 25, s. 5		1
Petition under G. L. c. 112, s. 64		1
Petition under G. L. c. 204, s. 23		1
Report to Superior Court under G. L. (Ter. Ed.) c. 214, s. 9—9A		2
		43
Total Entries on Equity Docket	*43*	
Total Entries on both Dockets	1,224	

THE SUPERIOR COURT

This court consists of a chief justice and thirty-one associate justices. It has equity and civil and criminal jurisdiction and holds sessions in all of the fourteen counties. It is the only court sitting with juries. The tabulated returns of the clerks under St. 1936, chap 31, § 3 for the year ending June 30, 1953, will be found on pp. 82-93.

To have a true picture of the work of the trial sessions one must take into consideration many cases settled during trials and others nonsuited or defaulted. An example is Suffolk County where a case is deemed tried only when a trial results in a verdict or disagreement.

Motion sessions are held regularly in Suffolk, Middlesex, Worcester, Hampden and Essex and Norfolk Counties. In other counties motions are considered at jury-waived sessions. Many questions are considered by the court at these sessions. Pre-trial sessions are reported below:

APPELLATE DIVISION, SUPERIOR COURT

FOR THE REVIEW OF SENTENCES TO THE STATE PRISON AND REFORMATORY FOR WOMEN

APPEALS IN INDICTMENT CASES UNDER ST. 1943, CH. 558
NOVEMBER 1, 1952—OCTOBER 31, 1953

(Report by William M. Prendible, Clerk of Superior Court for Criminal Business, Suffolk County)

Number of Appeals pending October 31, 1952	1	Sentences increased	2
Number of Appeals filed	176	Appeals dismissed	118
Sentences modified	12	Appeals withdrawn	34
		Pending October 31, 1953	11

The divisions consisting of three justices sat 16 days.

Appeals where the sentence has been modified or increased by the Appellate Division from November 1, 1952 to October 31, 1953.

Offence	*Original Sentence*	*New Sentence*
Unlawful sale of Narcotic Drug	5-7 yrs.	2½-4 yrs.
Robbery	5-7 yrs.	2½-3 yrs.
Manslaughter	8-12 yrs.	4-6 yrs.
Attempt to escape from Reformatory	7-10 yrs. forthwith notwithstanding sent. serving in Mass. Reform.	2½-5 yrs. forthwith notwithstanding sent. serving in Mass. Reform.

Attempt to escape from Reformatory	7-10 yrs. forthwith notwithstanding sent. serving in Mass. Reform.	2½-5 yrs. forthwith notwithstanding sent. serving in Mass. Reform.

Appeals where the sentence has been modified or increased by the Appellate Division from November 1, 1952 to October 31, 1953 and the defendant has appealed from more than one sentence.

	Offence	*Original Sentence*	*New Sentence*
A.	Armed Robbery	7-9 yrs. conc.	Appeal Dismissed
	Armed Robbery	12-15 yrs. conc.	Appeal Dismissed
	Abuse	4-5 yrs. conc.	Appeal Dismissed
	Carrying a Weapon	2½-3 yrs. conc.	Appeal Dismissed
	Carrying a Weapon	2½-3 yrs. conc.	Appeal Dismissed
	B&E Night with intent to steal	2½-3 yrs. conc.	Appeal Dismissed
	B&E Night with intent to steal	2½-3 yrs. conc.	Appeal Dismissed
	B&E Night with intent to steal	2½-3 yrs. conc.	Appeal Dismissed
	Robbery Armed	12-15 yrs.	12-20 yrs.
B.	Robbery Armed	18-25 yrs.	Mass. Reform. 10 yrs.
	Assault to Murder Armed	18-20 yrs. conc.	Mass. Reform 10 yrs. conc.
	Robbery Armed	18-25 yrs. conc.	Mass. Reform 10 yrs. conc.
C.	Carrying a Weapon	3-5 yrs. conc.	Appeal Dismissed
	Operating auto without authority after suspension of right	6-8 yrs. conc.	Appeal Dismissed
	Robbery Armed	6-8 yrs.	8-10 yrs.
D.	Assault to Abuse	10-25 yrs.	10-15 yrs.
	Kidnapping	7-10 yrs. conc.	Appeal Dismissed
	Unnatural Act	3-5 yrs. conc.	Appeal Dismissed
E.	Incest	10-15 yrs.	10-15 yrs. conc.
	Rape	15-20 yrs. from & after	15-20 yrs.
	Unnatural Acts	4-5 yrs from & after and conc.	4-5 yrs. conc.

PRE-TRIAL SESSIONS—SUFFOLK COUNTY

85 Days, July 1, 1952 to June 30, 1953

DISPOSITIONS

Cases on Pre-Trial list			5776
Cases Pre-tried	4049		
Cases not Pre-tried	1727		
Cases Pre-tried and Settled while awaiting trial	848		
Referred to Auditors	16		
Sent to Trial Sessions	2562		
Awaiting Trial	623		
		4049	
Cases not Pre-tried			
Settled	559		
Nonsuits	86		
Defaults	94		
Nonsuits and Defaults	28		
Continuances	960		
		1727	
Total Pre-trial "Dispositions"			5776

Cases in which jury was waived 667.

ESSEX COUNTY

Pre-trial at Lawrence

There were three days of pre-trial of jury cases at Lawrence:

RESULT

Number of cases pre-tried	150
Disposed of as result of pre-trial	33
Remaining cases to the jury trial lists for trial	117

PRE-TRIAL AT SALEM

There were two days at Salem of special pre-trials by order of the court of land damage cases against the commonwealth.

RESULT

Number of cases pre-tried	40
Disposed of as result of pre-trial	17
Remaining cases to the jury trial lists for trial	23

PRE-TRIAL SESSIONS IN HAMPDEN COUNTY

July 1, 1952 to June 30, 1953

Number of cases on pre-trial list		1145
Number of cases pre-tried	769	
Groups of cases pre-tried	476	
Number of cases added to next pre-trial list	202	

Groups of cases added to next pre-trial list	134
Number of cases settled	137
Groups of cases settled	88
Number of cases in which jury trial was waived	30
Number of cases nonsuited	3
Number of cases discontinued	4

PLYMOUTH COUNTY

There was a pre-trial session on March 27, 1953, at Plymouth, for hearing petitions for damage assessment against the Commonwealth.

WORCESTER COUNTY PRE-TRIAL REPORT

July 1, 1952 to June 30, 1953

Pre-tried	387
Settled	134 plus 31 land damages
Jury Claims waived	29
Judgment for neither party ordered	8
Defaulted	7
Non-suited	5
Ordered to Short List without pre-trial	32
Discontinued	1

REFERENCES TO AUDITORS AND MASTERS IN THE SUPERIOR COURT AND EXPENDITURES—CALENDAR YEAR 1952

(See Notes 1 and 2 below)

County	*Auditor*	*Master*	*1952*
Barnstable	11	4	$2,951.14
Berkshire	3	10	1,256.87
Bristol	5	15	6,185.42
Dukes	—	—	———
Essex	19	14	7,140.75
Franklin	1	4	329.00
Hampden	1	11	1,066.92
Hampshire	—	3	1,386.00
Middlesex	15	36	10,443.57
Nantucket	—	—	———
Norfolk	4	3	4,230.60
Plymouth	3	9	2,812.00
Suffolk (Civil)	39	46	44,946.00
Worcester	8	7	4,510.75
	109	162	$87,259.02

NOTE 1 (References)—Two or more cases tried together are counted as one reference.

NOTE 2 (Explanations)—Note: In Berkshire, Hampshire and Suffolk Counties these figures apply to the Superior Court only. In other Counties they include Supreme Judicial, Probate and Land Courts.

LAND COURT

This is a court of three judges created in 1898 for the registration of title to land and since then developed by additional extensions of jurisdiction both at law and in equity into the court in which almost all litigation regarding title to land takes place in addition to its original function of a court for the registration of title.

LAND COURT STATISTICS FROM JULY 1, 1952 TO JUNE 30, 1953

CASES ENTERED

Land Registration	700
Land Confirmation	3
Land Registration, Subsequent	842
Tax Lien	697
Miscellaneous	303
Equity	1,104
Total Cases Entered	3,649
Decree plans made	609
Subdivision plans made	923
Total plans made	1,532
Total appropriation	$276,625.00
Fees sent to State Treasurer	83,360.13
Income from Assurance Fund applicable to expenses	11,029.68
Total Expenditures	255,529.32
Net cost to Commonwealth	161,139.51
Assurance Fund June 30, 1953	351,280.41
Assessed value of land on petitions in registration and confirmation cases entered	3,748,972.00

CASES DISPOSED OF BY FINAL ORDER DECREE OR JUDGMENT BEFORE HEARING

Land Registration	556
Land Confirmation	1
Land Registration, Subsequent	842
Tax Lien	600
Equity and Miscellaneous	965
Total Cases Disposed of	2,964

PROBATE COURTS

There is a probate court in each county with jurisdiction of wills, trusts, settlement of estates, guardianship, adoption, change of name, divorce and separate maintenance and a variety of other matters. There are three judges in Suffolk and Middlesex, two in Essex, Worcester, Hampden, Norfolk and Bristol, one in each of the other counties.

The report prepared by the Administrative Committee of the Probate Courts for the year 1952 appears on page 94.

THE MUNICIPAL COURT OF THE CITY OF BOSTON

This court consists of a chief justice and eight associate justices, all full time judges. There are also six special justices. The tables showing the *details* of the civil business for the year 1952-3 will be found on pp. 80-81. The comparative table of civil business from 1913 to 1939 will be found in the 15th. Report, p. 65. The condensed civil and criminal business and other information for the year 1952 and the first 9 months of 1953 is as follows:

MUNICIPAL COURT OF THE CITY OF BOSTON

Civil Actions (Other than Small Claims Cases) 1952–53

Year	Entered	Removed	Per Cent of Entries	All Defaults	Per Cent of Entries	Tried	Per Cent of Entries	Total Plaintiff's Judgments	Average Plaintiff's Judgments Contract only	Heard, Appellate Division	Per Cent of Trials	To Supreme Judicial Court from Appellate Division	To Supreme Judicial Court under Employment Security Law
1952	18,447	947	5.1	7,921	42.9	1,748	9.5	$2,664,047.02	$224.65	28	1.6	8	5
1953 9 mos.	13,959	732	5.2	5,987	42.9	1,398	10.	$2,083,236.07	$231.71	19	1.4	9	0

SUBDIVISION—CONTRACT AND TORT—1952-1953

Year	Entered		Removed				Tried	
	Contract	Tort	Contract	Per Cent of Entries	Tort	Per Cent of Entries	Contract	Tort
1952	11,690	5,752	329	2.8	579	10.1	641	852
1953 9 mos.	8,826	4,415	279	3.2	416	9.4	556	686

TORT ENTRIES, REMOVALS AND TRIALS

1952

TORTS ENTERED		TORTS REMOVALS		TORTS TRIED	
Motor Vehicle	4,611	Motor Vehicle, Def.	485	Motor Vehicle	753
Other Torts	1,141	Other Torts	94	Other Torts	99
Total	5,752	Total	579	Total	852

1953 (9 months)

TORTS ENTERED		TORTS REMOVALS		TORTS TRIED	
Motor Vehicle	3,454	Motor Vehicle, Def.	355	Motor Vehicle	598
Other Torts	961	Other Torts	61	Other Torts	88
Total	4,415	Total	416	Total	686

Appeals to Supreme Judicial Court under Employment Security Law

1952		1953 (9 months)	
Appeals—Filed	5	Appeals—Filed	—
Appeals—Perfected	—	Appeals—Perfected	1
Appeals—Affirmed	—	Appeals—Affirmed	—
Appeals Reversed	—	Appeals Reversed	—

Summary Process (Ejectment) Entries

1952	543
1953 (9 months)	359

MUNICIPAL COURT OF THE CITY OF BOSTON
SMALL CLAIMS DIVISION

1952-1953 (9 months)

	Contract	Tort	Total	Contract	Tort	Total
Actions Entered	1,351	296	1,647	1,263	197	1,460
Actions Settled	309	110	419	285	54	339
Counter-Claims or Set-Offs	—	2	2	4	2	6
Trials	208	163	371	181	105	286
Reserved	74	84	158	69	48	117
Finding for Plaintiff	157	119	276	147	75	222
Finding for Defendant	45	44	89	34	30	64
Judgments by Default	620	12	632	603	5	608
Judgments by Non-Suit	12	3	15	7	2	9
Amount of Plaintiff's Judgments	$21,149.01	$3,970.74	$25,119.75	$22,059.41	$2,492.92	$24,552.33
Transferred to Regular Civil Docket	13	10	23	5	4	9
Removed to Superior Court	1	2	3	7	1	8
Executions	174	75	249	153	48	201
Amount of Plaintiff's Claims	$39,145.84	$10,573.58	$49,719.42	$37,856.85	$7,517.08	$45,373.93
Notices Returned Unclaimed	392	21	413	342	16	358

Execution Department—Paid Orders

	1952	1953 (9 Months)
Order of Notice	738	601
Certificate	856	661
Special Precept	138	129
Supersedeas	7	2
Comm.—Deposition	30	27
Transcript	23	21
Opinion	14	2
Order of Sale	5	4
Copies	57	38
	1868	1485

Supplementary Process

	1952	1953 (9 Months)
Entries	2570	2464
	1952	1953 (9 Months)
Summons	3528	3173
Capias	2172	1844
Notice to Show Cause	967	610
	6667	5627

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CRIMINAL BUSINESS

October 1, 1952—September 30, 1953

Total Business of Court

1. Automobile Violations	1,517
2. Traffic Violations	29,541
3. Domestic Relations	457
4. Drunkenness in Court	7,868

5. Drunkenness Released by Probation Officer	6,471
6. Other Criminal Cases	4,459
7. Inquests Entered	5
8. Search Warrants Issued	79
9. GRAND TOTAL BUSINESS	50,397

DISPOSITIONS

1. Pleas of guilty	26,143
2. Please of not guilty	3,047
3. Placed on file before trial, after trial, dismissed, nol-prossed, quashed, etc.	10,346
4. Defendants not arrested, pending for trial	4,188
5. Defendants acquitted	870
6. Defendants Bound Over to Grand Jury	636
7. Defendants placed on probation (not including surrenders)	2,686
8. Defendants fined and paid	21,331
9. Imprisonments	2,762
10. Fines Appealed	168
11. Imprisonment Appealed	855
12. Defendants pending for sentence	0

NON-CRIMINAL PARKING LAW

1. Parking tags turned in by violators as issued by Police	302,586

FINANCES

1. Money received by parking tag office	$315,231.87
2. Money received from court fines, forfeitures and fee, etc.	63,158.25
3. Total moneys received and turned over to Comm. County, City of Boston, etc.	378,390.22
4. Moneys received as bail by Court and forwarded to Superior Court or returned defendant	183,657.00
5. Total Moneys handled by the Court	$562,047.22

THE BOSTON JUVENILE COURT

The Boston Juvenile Court, created in 1906, is a separate court with jurisdiction in juvenile cases in the central district of Boston. It has one judge and two special justices.

Complaints — October 1, 1952—September 30, 1953:

	Boys	*Girls*	*Totals*
Juvenile Criminal	2	0	2
Delinquent	554	248	802
Wayward	2	0	2
Totals	558	248	806
	Men	*Women*	*Totals*
Adults	28	23	51
		No. of Complaints	*No. of Children Represented*
Neglected children		19	43

TOTAL NUMBER OF ALL COMPLAINTS:

Juvenile	806
Adult	51
Neglected children	19
Total	876

Active as of September 30, 1953:

	Individuals		*Complaints*	
Juveniles:				
Boys	236		245	
Girls	151		154	
Total		387		399
Adults:				
Men	22		24	
Women	26		26	
Total		48		50

Neglected Children	72	31
Totals	507	480

NUMBER OF CASES:

Juveniles	387
Adults	48
Neglected children	31
Total	466
Out-of-State Cases Under Supervision	1 Boy

THE APPELLATE TAX BOARD

The Appellate Tax Board is an administrative tribunal, to which have been transferred some of the functions formerly imposed on the Superior Court. It came into existence under St. 1937, c. 400, on May 29, 1937, succeeding the old Board of Tax Appeals created in 1931 and later abolished.

In previous years we included statistical tables of the work of the Board, but, to avoid unduly extending this report, the Council refers to the annual report made to the legislature under G. L. Chapter 58A, Section 4.

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS

Summary, 1952–53

(Other than Small Claims Cases)

	Actions Entered—Total	Actions Removed to Superior Civil Court—Total	Actions Defaulted	Ints. Filed		Marked for		Trial List				Findings		Appellate Division											
				To Plaintiff	To Defendant	Motion List	Trial List	Non-Suits	Defaults	Tried	Reserved	For Plaintiff	For Defendant	Requests for Report	Reports Allowed	Reports Dis-Allowed	Petitions to Establish	Reports Proved	Cases Heard	Cases Decided	Affirmed	Reversed	Modified	Entire Re-Trial Ordered	Partial Re-Trial Ordered
Contract	11,690	329	7,084	577	1,468	—	—	—	—	641	331	527	127	44	22	—	—	—	23	23	19	2	—	2	—
Tort	5,752	579	554	4,109	3,531	—	—	—	—	852	582	534	340	17	9	—	—	—	4	4	3	1	—	—	—
Contract or Tort	364	39	44	79	148	—	—	—	—	53	49	—	22	6	3	—	—	—	1	1	1	—	—	—	—
All Others	641	—	239	1	1	—	—	—	—	202	39	169	44	3	3	—	1	—	—	—	—	—	—	—	—
1952	18,447	947	7,921	4,766	5,148	3,712	11,593	109	649	1,748	1,001	1,230	533	70	37	—	1	—	28	28	23	3	—	2	—
1953 — January 1 – September 30 — 9 Months																									
1953, 9 mos.	13,959	732	5,987	4,349	4,225	3,138	7,886	71	436	1,398	801	1 002	371	45	21	1	2	—	19	19	13	6	—	—	—

MUNICIPAL COURT OF THE CITY OF BOSTON FOR CIVIL BUSINESS

SUMMARY, 1952-53—*Continued*

(OTHER THAN SMALL CLAIMS CASES)

	APPELLATE DIVISION—*Con.*							DEFENDANTS' JUDGMENTS						PLAINTIFFS' JUDGMENTS								
	Motions	Cases Consolidated Under G. L. c. 223, s. 2, as amended	Appeals to Supreme Judicial Court	Appeals to Supreme Judicial Court—Perfected	Appeals to Supreme Judicial Court—Affirmed	Appeals to Supreme Judicial Court—Reversed	Appeals to Superior Civil Court	Entered by Non-Suit	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Defendants' Judgments	Neither Party by Agreement	Entered by Default	Entered by Trial—Open Court	Entered by Trial—After Reservation	Entered by Agreement	Total Plaintiffs' Judgments	Amount of Plaintiffs' Judgments	Average Amount of Plaintiffs' Judgments	Executions Issued	Actions Transferred under Chapter 369, Acts 1943 as amended
Contract.....	9	7	5	3	4	1	—	17	34	93	84	228	230	6,273	276	251	975	7,775	$1,746,636.86	$224.65	7,424	—
Tort	1	15	2	2	—	1	—	61	45	295	48	449	425	13	225	309	2,980	3,527	916,430.31	259.83	700	—
Contract or Tort..	—	2	—	—	—	—	—	4	4	18	5	31	17	—	—	—	—	—	—	—	—	—
All Others.....	1	—	1	—	—	—	—	—	27	17	1	45	3	159	136	33	17	345	979.85	2.84	302	—
1952.....	11	24	8	5	4	2	8	82	110	423	138	753	675	6,445	637	593	3,972	11,647	$2,664,047.02	$228.73	8,426	157
1953 — JANUARY 1 - SEPTEMBER 30 — 9 MONTHS — *Continued*																						
1953, 9 mos.....	—	26	9	2	3	1	1	109	65	306	46	526	479	5,146	532	470	2,965	9,113	$2,083,236.07	$228.60	6,681	90

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CRIMINAL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953

Counties	CRIMINAL CASES													
	Number remaining at first of year.	Number of Indictments returned.	Number of appeal cases entered.	Appeals withdrawn before sitting following Entry.	Appeals withdrawn after next sitting, under St. 1937, c. 311.	Number of actions on bail bonds for recognizances entered.	Number disposed of in previous years brought forward for redisposition.	Indictments waived.	Number disposed of during year.	Number remaining at end of year.	Number tried during year.	Number awaiting trial at end of year.	Number of days during which a Superior Court judge has sat for trials, hearings or dispositions.	Days District Court judges were called in to sit in Superior Court.
Barnstable	73	80	111	22	10	0	7	13	195	57	47	43	15½	14
Berkshire	105	67	100	20	16	0	0	76	200	116	26	116	20	8
Bristol	115	305	429	98	22	0	5	64	634	164	113	115	55	43
Dukes	1	—	—	—	—	—	—	—	—	—	—	—	—	—
Essex	80	233	470	181	6	0	23	94	671	42	109	40	76	13
Franklin	18	4	22	4	8	0	1	16	33	16	6	16	10	5
Hampden	163	154	113	11	25	0	0	67	351	110	56	106	40	10
Hampshire	79	25	32	8	2	0	7	7	60	80	20	28	13½	8
Middlesex	424	957	869	62	94	0	17	67	1,879	600	371	546	194	22
Nantucket	0	1	1	1	0	0	0	0	1	0	1	0	1	0
Norfolk	203	519	370	49	50	4	149	7	936	243	153	240	39	44
Plymouth	92	316	270	49	4	3	200	12	752	43	110	15	62	26
Suffolk	363	1,198	2,288	103	89	9	390	22	3,747	501	714	413	458	106
Worcester	369	260	322	37	35	10	21	194	964	232	138	224	85	52
Total	2,085	4,119	5,397	645	361	26	820	639	10,423	2,204	1,864	1,902	1,069	351

Worcester complaints by District Attorney.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953

MADE BY THE CLERKS OF COURT TO THE JUDICIAL COUNCIL IN COMPLIANCE WITH ST. 1936, C. 31, § 3

CIVIL CASES

Table I — NUMBER UNDISPOSED OF AT BEGINNING OF YEAR

COUNTY	LAW								Equity	Divorce and Nullity	Total Jury Cases	Total Non-Jury
	JURY CASES				NON-JURY							
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others				
Barnstable	165	130	36	41	102	9	13	12	267	0	372	136
Berkshire	118	256	65	63	60	15	2	7	0	1	502	84
Bristol	380	1,520	375	74	123	55	38	24	336	0	2,349	240
Dukes	—	—	—	—	—	—	—	—	—	—	—	—
Essex	762	2,270	750	139	141	51	19	24	435	0	3,921	235
Franklin	33	139	24	24	21	0	3	6	85	1	220	30
Hampden	315	915	289	63	170	56	24	32	391	0	1,582	282
Hampshire	84	148	36	23	13	4	5	14	106	140	291	36
Middlesex	1,332	7,167	2,222	312	391	139	106	138	1,338	3	11,033	774
Nantucket	3	13	2	0	5	0	0	0	0	0	18	5
Norfolk	524	1,471	449	46	149	87	30	100	346	0	2,490	366
Plymouth	213	532	156	66	81	20	6	20	428	0	967	127
Suffolk	2,654	10,342	5,591	1,833	118	34	73	207	2,545	16	20,420	432
Worcester	723	3,638	1,101	105	189	151	82	53	445	0	5,567	475
Totals	7,306	28,541	11,096	2,789	1,563	621	401	637	6,722	161	49,752	3,222

Total undisposed of all kinds 59,837

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 2 — Number of New Cases Entered During the Year

County	Original Writs				Removals from District Courts								Equity	Divorce and Nullity	All Others
					By Plaintiff or Order of Ct.				By Defendant						
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others			
Barnstable	85	66	28	0	0	0	0	0	34	4	0	0	120	0	30
Berkshire	53	173	47	36	0	2	0	0	31	27	7	1	84	0	0
Bristol	134	773	167	85	0	0	0	3	91	196	20	4	169	0	0
Dukes	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Essex	371	1,190	399	20	5	56	9	2	159	577	116	3	328	0	100
Franklin	15	90	17	0	0	0	0	0	2	4	0	0	29	0	17
Hampden	231	1,201	234	56	0	18	3	0	84	120	33	0	217	0	0
Hampshire	26	105	27	9	0	1	0	2	11	30	1	0	21	59	0
Middlesex	610	2,862	698	274	0	0	0	8	238	1,039	140	19	603	0	0
Nantucket	4	0	3	0	0	0	0	0	0	0	0	0	2	0	0
Norfolk	181	785	243	135	0	0	0	0	115	189	20	0	153	0	77
Plymouth	99	354	62	2	0	0	0	0	39	114	12	0	226	0	55
Suffolk	1,163	4,747	2,347	348	17	158	28	5	389	855	226	16	1,337	2	0
Worcester	366	2,038	526	0	3	20	0	2	112	95	28	2	278	0	123
Totals	3,338	14,384	4,798	965	25	255	40	22	1,305	3,250	603	45	3,569	61	402
Combined Totals	23,485				342				5,203				4,030		
Total removals	5,545														
Grand Total Entries	33,060														

Note. Plymouth County — cases transferred from District Courts by order under C. 223, 2B as amended by St. 1945, Chapter 373. Contract 2, Motor torts 16.

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 3 — Number of Trials, Cases Tried

County	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	3	2	2	5	1	2	1	0	4	0
Berkshire	2	3	4	11	0	4	0	1	16	1
Bristol	30	165	49	0	5	3	1	0	13	0
Dukes	—	—	—	—	—	—	—	—	—	—
Essex	30	134	43	12	14	13	4	3	45	0
Franklin	3	8	4	8	1	0	0	0	0	1
Hampden	22	93	30	6	8	2	2	2	43	0
Hampshire	5	30	2	2	0	2	0	0	1	27
Middlesex	63	227	74	30	32	32	6	9	82	0
Nantucket	1	2	0	0	0	0	0	0	0	0
Norfolk	23	48	32	2	8	3	1	1	12	0
Plymouth	10	27	8	6	4	1	0	2	11	0
Suffolk	85	290	155	59	169	195	43	44	616	3
Worcester	18	89	33	8	13	4	0	2	17	0
Total	295	1,128	436	149	255	261	58	64	860	32
Combined totals	2,008				638				860	32
Total trials	3,538									

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 4 — Number of Jury Verdicts

County	For Plaintiff												For Defendant					
	Less than $200			$200 to $500			$500 to $1,000			Over $1,000			Ordered			Not Ordered		
	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts
Barnstable	0	0	0	1	0	0	1	0	0	1	1	2	0	0	0	0	1	0
Berkshire	0	0	0	0	0	0	0	0	0	1	1	1	1	2	2	0	0	1
Bristol	2	6	0	5	12	1	2	12	0	5	13	1	1	2	11	5	26	2
Dukes	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Essex	0	12	2	2	14	6	5	8	2	4	18	8	0	1	3	7	34	7
Franklin	0	0	0	0	0	1	0	1	0	3	4	1	0	0	0	0	2	2
Hampden	0	11	3	6	20	3	4	23	2	9	31	10	2	4	1	8	78	16
Hampshire	0	4	0	1	0	0	0	2	0	3	9	1	0	0	0	1	5	1
Middlesex	1	6	0	9	27	9	11	22	12	20	66	17	5	12	14	16	103	22
Nantucket	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	2	0
Norfolk	1	6	2	4	8	1	5	6	4	6	15	2	1	6	6	5	25	16
Plymouth	1	5	1	1	4	0	1	3	1	3	9	2	1	1	3	2	9	2
Suffolk	1	27	3	8	27	9	15	27	10	28	82	78	9	5	25	24	122	89
Worcester	1	2	8	3	6	1	1	9	3	6	36	12	3	6	4	4	30	4
Totals	7	79	19	40	118	31	45	113	34	89	285	135	23	39	69	73	437	162
	105			189			192			509			131			672		
	Total for Plaintiff 995												Total for Defendant 803					

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 5 NUMBER OF NON-JURY FINDINGS

County	Findings for Plaintiff												Findings for Defendant		
	Less than $200			$200 to $500			$500 to $1,000			Over $1,000					
	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts	Contracts	Motor Torts	Other Torts
Barnstable	0	1	0	0	0	0	0	0	0	0	2	0	0	0	1
Berkshire	0	1	0	0	3	0	0	0	0	0	0	0	0	0	0
Bristol	0	0	0	0	0	0	0	2	0	1	1	1	4	0	0
Dukes	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Essex	2	3	0	4	3	0	1	0	0	5	6	0	3	0	1
Franklin	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Hampden	1	0	0	4	0	0	1	1	0	1	1	0	1	0	2
Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Middlesex	1	8	3	8	8	0	4	3	3	13	4	0	6	9	0
Nantucket	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Norfolk	1	0	0	1	1	2	0	0	2	3	1	0	3	0	0
Plymouth	0	1	0	0	0	0	1	0	0	1	0	0	2	4	0
Suffolk	38	28	13	24	35	9	23	17	10	30	38	23	54	77	31
Worcester	1	0	0	2	0	0	1	0	0	1	0	0	8	4	0
Total	44	42	16	43	50	11	31	23	15	55	53	24	82	94	35
Combined Totals	102			104			69			132			211		
	Total for Plaintiff 407												For Defendant 211		

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

County	CIVIL CASES																	
	Table 6 — Finally Disposed Of																	
	Jury								Non-Jury								Equity	Div. and Nul.
	On Auditor's Report				Otherwise				On Auditor's Report				Otherwise					
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	0	0	0	0	58	59	15	18	5	0	1	0	30	8	4	4	226	0
Berkshire	2	0	0	0	31	129	26	31	0	0	0	0	9	9	3	3	81	1
Bristol	0	0	0	0	102	957	177	54	0	0	0	0	54	25	24	12	112	0
Dukes	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Essex	5	0	0	0	342	1,343	359	71	7	0	0	0	112	100	19	30	262	0
Franklin	0	0	0	0	13	91	15	18	0	0	0	0	3	0	0	2	23	0
Hampden	0	0	0	0	142	1,002	189	28	0	0	0	0	73	40	4	10	143	0
Hampshire	0	0	0	0	35	110	18	4	1	0	0	0	6	2	0	1	21	59
Middlesex	0	0	3	1	699	3,84[illegible]	874	173	1	0	0	0	300	119	56	199	1,164	3
Nantucket	0	0	0	0	4	0	0	0	0	0	0	0	6	4	3	0	1	0
Norfolk	0	0	0	0	268	816	178	40	0	0	0	0	107	35	9	113	357	0
Plymouth	0	0	0	0	81	342	53	30	0	0	0	0	34	8	6	13	130	0
Suffolk	1	0	0	0	1,435	5,605	2,192	334	5	0	0	3	855	497	189	371	2,077	7
Worcester	0	0	0	0	258	1,965	507	100	8	0	0	0	152	34	19	31	294	0
Totals	8	0	3	1	3,528	16,262	4,603	901	27	0	1	3	1,741	881	336	789	4,891	70
Combined Totals	12				25,294				31				3,747				4,891	70
Total disposed of, all kinds	34,045																	

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 7 — Cases Triable i. e. at Issue and Awaiting Trial and not Marked Inactive

County	Jury				Non-Jury				Triable but Enjoined				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	129	119	56	36	37	10	10	4	0	0	0	0	36	0
Berkshire	111	270	40	45	20	22	4	1	0	0	0	0	23	0
Bristol	330	1,512	351	98	79	26	23	9	8	1	1	0	98	0
Dukes	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Essex	651	2,384	788	139	64	27	17	8	0	7	0	0	95	0
Franklin	25	123	21	17	6	1	0	3	0	0	0	0	15	
Hampden	288	966	285	75	128	21	12	67	0	0	0	0	270	0
Hampshire	35	127	29	15	5	1	4	10	0	0	0	0	23	74
Middlesex	1,045	6,410	2,010	275	276	340	86	38	0	86	16	0	295	0
Nantucket	1	4	3	0	2	0	1	0	0	0	0	0	1	0
Norfolk	459	1,572	495	75	93	101	35	30	0	1	0	0	119	0
Plymouth	172	585	142	76	27	9	6	5	0	0	0	0	61	0
Suffolk	2,269	9,968	4,008	460	254	278	35	54	1	48	8	0	345	5
Worcester	850	3,759	1,112	70	73	114	60	67	0	20	0	0	399	0
Totals	6,365	27,799	9,340	1,381	1,064	950	293	296	9	163	25	0	1,780	79
Combined Totals	44,885				2,603				197				1,780	79
Grand Total	49,544													

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 8 CASES REMAINING UNDISPOSED OF INCLUDING CASES MARKED INACTIVE

COUNTY	JURY				NON-JURY				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	179	141	65	46	114	11	12	15	161	0
Berkshire	149	304	87	67	71	31	5	6	179	0
Bristol	388	1,508	361	105	124	54	38	19	393	0
Dukes	—	—	—	—	—	—	—	—	—	—
Essex	802	2,462	898	161	196	69	31	28	474	0
Franklin	32	141	26	20	23	1	3	7	91	1
Hampden	416	1,169	370	91	203	39	27	33	453	0
Hampshire	78	174	46	22	14	2	5	21	106	140
Middlesex	1,189	6,844	2,138	299	378	390	97	89	737	0
Nantucket	1	4	3	0	4	0	1	0	1	0
Norfolk	479	1,618	519	93	123	117	41	43	153	0
Plymouth	236	666	172	65	83	19	6	21	521	0
Suffolk	2,760	10,312	5,819	1,647	609	362	157	300	1,099	11
Worcester	888	3,806	1,148	83	87	137	63	70	429	0
Totals	7,597	29,149	11,652	2,699	2,029	1,232	486	652	4,797	152
Combined Totals	51,097				4,399				4,797	152
	Total of all kinds 60,445									

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

CIVIL CASES

Table 9 CASES MARKED INACTIVE IN PREVIOUS YEARS

COUNTY	JURY				NON-JURY				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	16	7	4		16	0	0	1	20	0
Berkshire	9	17	3	1	21	1	0	0	31	0
Bristol	3	12	3	0	10	6	3	2	71	0
Dukes	—	—	—	—	—	—	—	—	—	—
Essex	55	43	42	9	17	3	0	5	40	0
Franklin	2	5	2	2	2	0	1	3	5	0
Hampden	63	93	32	13	54	11	8	12	86	0
Hampshire	8	13	5	1	4	1	1	1	21	30
Middlesex	4	23	7	2	7	6	2	2	363	0
Nantucket	0	0	0	0	0	0	0	0	0	0
Norfolk	6	15	5	0	5	1	0	0	4	0
Plymouth	32	19	12	4	16	7	0	5	79	0
Suffolk	18	57	25	6	21	10	2	14	65	2
Worcester	19	22	15	6	8	1	2	2	21	0
Totals	235	326	155	46	181	47	19	47	806	32
Combined Totals	762				294				806	32

Total of all kinds marked inactive in previous years 1,894

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

County	CIVIL CASES									
	Table 10 — Cases Marked Inactive During the Year									
	Jury				Non-Jury				Equity	Divorce and Nullity
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others		
Barnstable	17	2	4	2	18	1	2	1	14	0
Berkshire	13	4	4	5	8	3	1	1	16	0
Bristol	21	25	10	3	21	8	6	6	52	0
Dukes	—	—	—	—	—	—	—	—	—	—
Essex	39	39	29	5	19	10	0	1	41	0
Franklin	3	5	0	0	5	0	2	0	13	0
Hampden	53	77	37	4	22	7	4	4	73	0
Hampshire	4	7	5	1	1	0	0	3	20	9
Middlesex	0	0	0	0	0	0	0	0	0	0
Nantucket	0	0	0	0	2	0	0	0	0	0
Norfolk	7	14	11	0	6	4	4	2	4	0
Plymouth	19	19	18	2	12	1	0	2	70	0
Suffolk	38	105	48	12	66	23	11	18	26	4
Worcester	19	25	21	7	6	2	31	1	9	0
Totals	233	322	187	41	186	59	61	39	338	13
Combined Totals	783				345				338	13
	Total marked inactive of all kinds—1,479									

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

ABSTRACT AND TABULAR STATEMENT OF THE RETURNS RELATIVE TO THE CIVIL BUSINESS OF THE SUPERIOR COURT FOR THE YEAR ENDING JUNE 30, 1953—*Continued*

County	CIVIL CASES										Table 12	
	Table 11 — Inactive Cases Dismissed During Year										Number of Days in which Court Sat	
	Jury				Non-Jury				Equity	Divorce and Nullity	Jury	Non-Jury Including Equity and Motion and Pre-Trial Sessions
	Contracts	Motor Torts	Other Torts	All Others	Contracts	Motor Torts	Other Torts	All Others				
Barnstable	10	1	2	2	2	2	0	0	11	0	12½	8½
Berkshire	1	15	2	2	3	0	0	0	13	0	46	9
Bristol	0	0	0	0	1	0	0	0	7	0	122	24
Dukes	—	—	—	—	—	—	—	—	—	—	—	—
Essex	20	20	12	2	1	2	3	0	23	0	273	76
Franklin	1	3	0	2	1	0	0	2	5	0	38	1
Hampden	17	23	18	7	14	5	2	4	29	0	189	95
Hampshire	2	5	0	1	2	0	0	0	5	14	36½	2
Middlesex	0	0	0	0	0	0	0	0	0	1	665	196
Nantucket	0	0	0	0	0	0	0	0	0	0	3	2
Norfolk	0	0	0	0	0	0	0	0	0	0	117	21
Plymouth	17	4	4	0	6	3	1	3	20	0	83	32
Suffolk	7	13	8	0	5	3	1	2	11	3	1,130	945
Worcester	10	2	10	0	5	0	1	0	5	0	363	104
Totals	85	86	56	16	40	15	8	11	129	18	3,078	1,515½
Combined Totals	243				74				129	18	4,593½ days	
	Total dismissed all kinds—464											

**Note* Hampden:

Motion	19 days
Pre-trial	18 days
Merit	58 days
Total	95 days

Note. Suffolk County — Session without Jury
Table 12 column 2 — 945 days broken down as follows:

Law & Equity Sessions	441
Motion Session	254
Pre-trial Session	85
"A" Session	165
Total	945

REPORTS OF REGISTERS OF PROBATE FOR YEAR ENDING DEC. 31, 1952

(Table prepared by the Administrative Committee of the Probate Courts)

	Probate—Decrees																Divorces			Fees Collected				
	Original entries	Administrations Allowed	Wills allowed	Guardians Appointed	Conservator Appointed	Trustees Appointed	Accounts Allowed	Real Estate Sales	Real Estate Mortgages	Real Estate Partitions	Equity Decrees	Separate Support	Desertion and Living Apart	Custody	Other Decrees	Papers Recorded	Original Entries (New Cases)	Decrees and Orders Entered		Probate	Divorce	Certificates and Copies	Total	Commitment, Insane, Feeble Minded
																		Nisi	Others					
Barnstable	558	154	190	32	16	28	313	81	5	10	8	8	0	2	242	2,034	190	128	15	$3,265.65	$950.00	$2,042.05	$6,257.70	2
Berkshire	1,018	335	264	79	48	34	613	148	7	11	12	16	9	6	442	3,508	289	196	69	5,499.05	1,485.00	2,589.00	9,573.05	2
Bristol	2,244	842	576	170	75	53	637	378	13	21	20	74	6	10	1,492	7,521	749	537	559	10,250.00	3,714.00	6,573.65	20,536.65	6
Dukes	83	23	37	4	9	2	57	13	1	2	3	0	0	2	12	428	18	16	23	530.00	90.00	305.10	925.10	0
Essex	3,457	1,406	941	313	114	97	2,057	584	17	18	49	62	13	13	1,343	9,624	904	662	394	18,501.00	4,520.00	10,200.50	33,221.50	0
Franklin	463	143	111	31	31	24	223	64	0	1	4	2	0	0	133	2,313	108	76	31	2,333.00	540.00	794.90	3,667.90	5
Hampden	1,988	811	488	131	75	86	1,596	287	9	7	90	52	4	16	977	12,170	1,034	672	1,037	11,302.40	5,170.00	6,172.90	22,645.30	23
Hampshire	626	205	164	26	13	17	364	46	3	1	11	1	4	1	992	2,466	38	31	28	2,878.00	190.00	1,752.30	4,820.30	2
Middlesex	6,680	2,467	1,878	576	286	273	4,339	990	47	16	72	159	14	36	4,889	23,415	1,965	1,228	1,534	37,103.00	9,730.00	25,243.00	72,076.00	49
Nantucket	52	21	21	3	6	—	50	15	—	2	—	—	1	—	3	272	9	8	11	364.00	45.00	160.60	569.60	0
Norfolk	2,810	916	893	270	107	181	2,625	301	19	11	52	39	8	11	1,108	11,168	574	302	563	17,365.00	2,870.00	11,383.66	31,888.66	12
Plymouth	1,579	611	460	97	70	40	879	259	20	15	92	42	12	5	358	7,149	451	295	621	8,617.00	2,255.00	3,776.10	14,648.10	7
Suffolk	5,605	2,235	1,214	536	237	215	4,451	623	32	12	153	1,061	15	65	2,575	27,321	2,020	1,261	1,797	33,578.00	9,965.00	16,823.25	60,366.25	1,719
Worcester	3,511	1,266	897	353	159	153	1,263	491	30	23	63	135	5	6	2,015	10,381	1,212	1,184	212	16,763.00	6,060.00	7,468.90	30,291.90	47